The Digest of Justinian

Volume 4

English-language translation edited by

Alan Watson

THE DIGEST OF JUSTINIAN

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TRANSLATION EDITED BY

ALAN WATSON

VOL. 4

PENN

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PREFACE TO THE PAPERBACK EDITION

This is a corrected edition, minus the Latin text, of the four-volume *The Digest of Justinian*, Latin text edited by Theodor Mommsen with the aid of Paul Krueger, English translation edited by Alan Watson, published by University of Pennsylvania Press in 1985.

This edition incorporates a number of corrected translations. I am grateful to all who called suggested changes to my attention, and in particular to Tony Honoré and Olivia Robinson.

The biggest change has been a new translation by Sebastian and Olivia Robinson of the *Dédoken*, the Greek version of the preface, "The Confirmation of the *Digest*." The previous edition repeated the translation of the rather different Latin preface.

A note about the appearance of the pages. The pagination of the Mommsen edition has been maintained, as was done in the original four-volume hardcover edition. As a result, the pages of the translation vary in length.

ALAN WATSON

GLOSSARY

Abolitio. See Accusatio.

Acceptilatio (Formal Release). The method by which a creditor freed a debtor from his obligation under a verbal contract [*stipulatio* q.v.] producing the same effects as performance. *See D.*46.4.

Accessio (Accession). A general term for the acquisition of ownership by joining property to or merging it with something already owned by the acquirer. *See D.*41.1.

Accusatio (Accusation). The bringing of a criminal charge. Normally (exclusively until the early empire) this was left to the initiative of a private citizen acting as accuser [*delator*]. If a magistrate accepted the charge, he ordered its registration [*inscriptio*] on an official list. It could be removed from the list and so annulled [*absolutio*] during a public amnesty, or where the accuser withdrew the charge with the permission of the court. Unjustified withdrawal was a crime in itself [*tergiversatio*]. *See D.*48.2,16.

Actio Arbitraria. An action in which the judge could order the defendant to restore or produce the property at issue. If he failed to do so, the final judgment penalized him in various ways. *See D.*6.1.35.1; *D.*4.2.14.4.

Actio Civilis. See Ius Civile.

Actio Confessoria. See Servitus.

Actio Contraria. An action given to certain persons in particular legal situations where the normal direct action lay against them. *See* tutors [*tutor* q.v.] *D.* 27.4; depositees *D.*16.3; borrowers for use *D.*13.6.; creditors in the contract of *pignus* [q.v.] *D.*13.7.

Actio Famosa. See Infamia.

Actio in Factum. An action given originally by the *praetor* [q.v.] on the alleged facts of the case alone, where no standard civil law [*ius civile* q.v.] action was directly applicable. The expression *actio utilis* is also found, referring to a praetorian action which extended the scope of an existing civil law action, for example, by means of a fiction. The exact difference, if any, between this and the *actio in factum* is not known. *See D.*9.2.

Actio in Personam (Personal Action). An action based on an obligation of the defendant, whether this arose from a contract, delict, or other legal circumstance. Such an action lay only against the person under the obligation. Cf. *Actio in Rem.*

Actio in Rem (Real Action). An action asserting ownership of property, or other related though more limited rights over it, for example, a servitude [*servitus* q.v.]. Such an action lay against anyone withholding the property. Cf. *Actio in Personam.*

Actio Negatoria. See Servitus.

Actio Popularis. A penal action which could be brought by any person to protect the public interest in certain circumstances. The penalty was often paid to the complainant. *See D.*47.23.

Actio Praescriptis Verbis. An action given to a person after he had performed his part of the bargain under a contract which was not one of the standard types recognized by Roman law. *See D.*19.5.

Actio Utilis. See Actio in Factum.

Addictio in Diem. An agreement allowing a seller to set the sale aside if he received a better offer within a certain time. *See D.*18.2.

Ademptio (Ademption). The revocation, express or implied, of any disposition, usually a legacy. *See D.*34.4.

Adiudicatio (Adjudication). The order given by a judge [*iudex* q.v.] to settle certain proceedings between claimants over common property or between neighbors over boundaries. *See D.*10.2–3.

Adoptio (Adoption). A type of adoption where a dependent person [*alieni iuris* q.v.] was transferred from one family to another. This involved a change of *paterfamilias* [q.v.]. Adopted children were normally in the same legal position as natural children. Cf. *adrogatio* though the term *adoptio* is sometimes used to cover both. *See D.*1.7.

Adrogatio (Adrogation). A type of adoption where an independent person [*sui iuris* q.v.] joined a family, coming under parental power [*patria potestas* q.v.]. This could only be done to save a family from extinction and many restrictions were placed upon it. *See D.*1.7.

Adulterium (Adultery). This was made a criminal offense for a married woman by statute. Her husband was required to divorce and prosecute her, and her father could kill her and her partner with impunity in certain circumstances. *See D.*48.5.

Aedilis (Aedile). A magistrate of the republic whose duties were connected with the general management of daily life in the city, including some police work and the supervision of streets and markets. One type, the curule aediles, issued an edict [*edictum* q.v.] in connection with the latter which greatly influenced the law on sale and delictal liability for animals. The duties of the aediles were gradually taken over by the various types of prefect [*praefectus* q.v.] during the empire. *See D.*1.2.2.26; *D.*21.1.

Aestimatum. A transaction in which one person receives property from another on the basis that, within a specified time, he will either return the property or pay an agreed price. *See D.*19.3.

Agnatus (Agnate). A person related through the male line, whether by birth or adoption, to a common male ancestor. This is an important relationship throughout Roman law, especially in connection with the law of succession. Cf. also *paterfamilias.*

Alieni Iuris (Dependent). Subject to the legal power of someone else, either parental power [*patria potestas* q.v.] in the case of a son-in-power [*filiusfamilias* q.v.] and other descendants or the power of a master where slaves were concerned. Various legal disabilities were involved in either case. *See D.*1.6.

Aureus. See Solidus.

Bonae Fidei Iudicia (Actions of Good Faith). Certain contractual actions, for example, on sale, and certain quasi-contractual ones where the judge [*iudex* q.v.] had to take

account of what ought to be done or given in good faith (*bona fides*) by the parties. This gave the judge wide discretion as to the amount of damages he could award. He could also take account of any defense [*exceptio* q.v.] even where it had not been expressly stated by the defendant.

Bonorum Possessio. A type of possession granted originally by the *praetor* [q.v.] giving rise to an extended or sometimes alternative system of succession, both testate and intestate, to that provided by the civil law [*ius civile* q.v.]. It was protected by an *interdictum* [q.v.] and an action. *See D.*37.1.

Calumnia. (a) In private law, vexatious litigation or receiving money for this purpose. (b) In criminal law, the offense of maliciously or recklessly bringing a false criminal charge. *See D.*3.6.

Capitalis (Capital). A criminal matter where the penalty is death, loss of liberty, or loss of citizenship.

Capitis Deminutio (Change of Civil Status). A loss of or change in one or more of the three basic elements of civil status, that is, freedom, citizenship, and membership of a family. *See D.*4.5.

Castigatio (Corporal Punishment). This took a number of forms: *flagellatio* was generally a whipping for slaves; *fustigatio* was beating with a rod or club, mainly a military punishment; *verberatio* involved multiple lashes and seems to have been severe.

Cautio. (a) A guarantee, either real or personal, that certain duties will be fulfilled. (b) A written document providing evidence of a contract, usually *stipulatio* [q.v.].

Census (Census). A public register of citizens, which estimated their property holdings and so assigned them to the various social classes. *See D.*50.15.

Codex. A collection, official or unofficial, of imperial enactments rather than a complete statement of the law as in a modern "code." *See* preface.

Cognitio. (a) A type of civil procedure, often referred to as *extra ordinem*, signifying its distinctness from the Formulary System [*formula* q.v.] of classical times, which it replaced in the third century A.D. The main difference was that under the *Cognitio* System the whole proceedings took place before an imperial magistrate. (b) The term is also used in a more general way in administrative and crimnal proceedings to cover the competent area of a judicial inquiry, or the investigation itself.

Collatio Bonorum. A contribution in respect of prior gifts which was required of emancipated [*emancipatio* q.v.] children who wished to benefit by intestate succession to their father. *See D.*37.6.

Collegium (Association). Any association, public or private, for religious, professional, or other purposes. Legal restrictions were placed on such associations to prevent subversive activities. *See D.*47.22.

Compensatio (Set-Off). The reduction of any claim by taking into account the defendant's counterclaim based on another transaction. *See D.*16.2.

Concubinatus (Concubinage). A legally and socially recognized monogamous relationship short of marriage. *See D.*25.7.

Condictio. A type of action alleging a civil law [*ius civile* q.v.] debt without mentioning any cause of action, available not only as a contractual remedy, but also on a quasi-contractual basis, where unjustified enrichment could be shown. Although its form was always the same, its name varied according to the situation involved, for example, the *condictio* for money not due [*indebiti*], that is, money paid in error. *See D.*12.4–13.3.

Constitutio. The general word for imperial legislation of all kinds. *See D.*1.4.

Constitutum Debiti. A pact [*pactum* q.v.] consisting of an agreement to pay an existing debt, incurred by the party himself or some other person, at an agreed time. It gave rise to an *actio in factum* [q.v.] for half as much again as the original debt. *See D.*13.5.

Consul (Consul). The title of the two supreme magistrates of the republican constitution, elected annually. Consuls continued to be elected during the empire with various administrative and judicial powers, but the position became increasingly an honorary one until it was abolished by Justinian. *See D.*1.10.

Conubium. The right to contract a civil law [*ius civile* q.v.] marriage, possessed generally only by Roman citizens.

Crimem (Crime). This term can denote a criminal charge or criminal proceedings as well as the crime itself. *See D.*47.11.

Cura, Curatio (Care). These terms were applied to various institutions whereby the well-being and/or property of certain persons were legally safeguarded by someone else, a *curator.* The most important forms were care of a lunatic, of a spendthrift, and the guardianship of an independent [*sui iuris* q.v.] person who was a *minor* [q.v.]. *See D.*27.10; *D.*4.4.

Curator. See Cura.

Decurio (Decurion). A member of a municipal council. This body decided all local matters. During the later empire the office became more burdensome than desirable in many places. *See D.*50.2.

Defensor (Defender). A person who defends another's interests at a trial, often because of his legal relation to him, for example, as *tutor* [q.v.]. *See D.*3.3.

Delator. See Accusatio.

Delegatio. A form of novation [*novatio* q.v.] in which the alteration consisted of a change of the creditor or the debtor in relation to the other party. *See D.*46.2.

Deportatio (Deportation). The punishment of perpetual banishment. It was the most severe of kinds of banishment, since it involved confinement to a fixed place, confiscation of property, and loss of citizenship. *See D.*48.22.

Dies utiles. The days on which legal proceedings could be brought.

Divus (Deified). A title granted to an emperor after death if he had been officially consecrated as a state deity.

Edictum (Edict). A proclamation by a magistrate or the emperor. In the republic, the edicts which had the greatest effect on private law were those of the *praetores* [q.v.; see also *aedilis*]. Each praetor could issue a new edict for his year in office, setting out the actions he was prepared to allow, but in practice he took over much of the material from his predecessors. This led to the development of an almost standard body of rules known as the "Edict," containing the numerous praetorian extensions to the civil law [*ius civile* q.v.]. This process survived the transition to empire, but the Emperor Hadrian ordered the consolidation of the Edict early in the second century A.D.; thereafter it does not appear to have been a source of new law.

Emancipatio (Emancipation). Voluntary release from parental power [*patria potestas* q.v.], conferring independent [*sui iuris* q.v.] status. *See D.*1.7.

Emphyteusis. A real right over the property of another, consisting in a grant of land by the state or local authority on a long lease or in perpetuity for a groundrent. *See D.*6.3.

Exceptio (Defense). A defense, inserted originally in the *formula* [q.v.], which did not deny the prima facie validity of the claim, but adduced some circumstance which nullified it, for example, duress. There was a number of these defenses, each named after the fact they alleged, for example, the defense of fraud. *See D.*4.3.

Exheredatio (Disherison). The exclusion by a testator of his issue or other persons from taking benefit under his will. Many formal and material restrictions were placed upon such exclusion. *See D.*28.2.

Exilium (Exile). This term was often used to mean voluntary exile as well as involuntary banishment. Voluntary exile after, or to escape from, capital condemnation involved loss of citizenship and property as well as being made an outlaw.

Extraneus Heres. See Heres.

Extra Ordinem (Extraordinary). (a) In private law, this refers to the *Cognitio* System [*cognitio* q.v.] (b) In criminal law, it refers to proceedings other than those authorized for the *quaestiones perpetuae* [q.v.]. The criminal jurisdiction of, for example, the urban prefect [*praefectus* q.v.] was thus *extra ordinem. See D.*50.13.

Familia (Family). As well as a family in the modern sense this term sometimes also covers a person's whole household, including freedmen and slaves as well as relations. *See D.*50.16.195.

Fideicommissum. A charge in a will imposed on an heir or legatee to transfer property to someone else. *See D.*30–31.

Fideiussio (Verbal Guarantee). A verbal contract of personal guarantee, usually but not necessarily covering a principal debt contracted by *stipulatio* [q.v.], its form being a variant of that contract. *See D.*46.1.

Filiusfamilias (Son-in-Power). A son subject to the parental power [*patria potestas* q.v.] of the head of the household, the *paterfamilias* [q.v.]. He was subject to various disabilities, especially in the field of property, although his position was improved by the existence of the *peculium* [q.v.]. This subjection only applied in private law; in public law matters a son-in-power was in the same position as the head of the household.

Flagellatio. See Castigatio.

Formula. The Formulary System was a type of civil procedure introduced in the republic and continuing to operate until the third century A.D., though it was increasingly superseded and eventually replaced by the *Cognitio* [q.v.] System. However, many traces of it can still be found in the *Digest.* The procedure was controlled by the *praetor* [q.v.] who was required by the parties to frame a formal statement of the legal issues in the case, the *formula.* This was then passed on to a lay judge [*iudex* q.v.] for a hearing on the facts. Details of the various kinds of *formulae* available would be found in the Edict [*edictum* q.v.].

Fustigatio. See Castigatio.

Habitatio (Right of Habitation). The right to occupy a house for life. It was a personal servitude [*servitus* q.v.]. *See D.*7.8.

Heres (Heir). The person who inherits nearly all the rights and duties of the deceased by testate or intestate succession. There was a number of different kinds of heir. A *heres suus* was someone subject to the deceased's parental power [*patria potestas* q.v.] at the time of death; A *heres suus et necessarius* was such a person who became independent [*sui iuris* q.v.] by the death. This type of heir could not refuse the inheritance, as was also the case with the *heres necessarius*, a slave who was

manumitted [*manumissio* q.v.] for this purpose. An *extraneus heres* was someone not subject to the deceased's parental power at time of death, either being unrelated or, for example, emancipated [*emancipatio* q.v.]. A *heres legitimus* was a person who succeeded in accordance with the civil law [*ius civile* q.v.] rules on intestacy. *See D.*28.5.

Honestiores. See Humiliores.

Humiliores. Persons of low social status, in contrast to the upper classes, the *honestiores.* The main legal difference was that only the former were liable to certain kinds of punishment, for example, crucifixion, torture, and corporal punishment.

Hypotheca. A contract of pledge in which the creditor obtained neither ownership nor possession of the property pledged. *See D.*13.7.

Imperium (Authority). The power of the higher republican magistrates, including the *praetor* [q.v.], and later the emperor to issue orders and enforce them, in particular the right to administer justice and to give military commands.

Impubes. A person under the age of puberty, which was eventually fixed at twelve years of age for girls and fourteen for boys. Such persons lacked full legal capacity, and those who were independent [*sui iuris* q.v.] had to be in tutelage [*tutela* q.v.] *See D.*26.

Incola. A person domiciled in a city or community other than the one in which he was born. *See D.*50.1.

Infamia. A condition of disgrace resulting from certain types of immoral or wrongful conduct. It followed, for instance, on conviction for a crime, or condemnation in delictal actions and those involving breach of trust called *actiones famosae.* Many legal disabilities resulted from this condition. *See D.*3.2.

Infans. A child under the age at which rational speech was possible, later fixed at seven years old. Such persons were a type of *impubes* [q.v.] with few legal powers.

Inscriptio. See Accusatio.

Institor. See Procurator.

Interdictum (Interdict). An order issued originally by the *praetor* [q.v.] or other magistrate in an administrative capacity, giving rise to further proceedings if disregarded. Many interdicts in private law were concerned with the protection of possession against unlawful interference in various circumstances. At times, interdicts were a procedural device for awarding interim possession, the party who acquired this becoming the defendant in a subsequent action. But they were also for many other private law and also public law purposes, for example, the interdict from fire and water was a form of banishment pronounced on a voluntary exile [*exilium* q.v.]. The complicated procedure required under the Formulary System [*formula* q.v.] for the use of interdicts became obsolete under the *Cognitio* [q.v.] System, and they were replaced by ordinary actions, although the issues and much of the terminology of the older system remained. *See D.*43.

Iudex (Judge). In the private law Formulary System [*formula* q.v.], the judge was a private individual chosen by the parties to decide the case on its facts, the legal issues having already been defined by the *praetor* [q.v.]. Under the later *Cognitio* [q.v.] System and in public and criminal matters, the term was used of any imperial official with jurisdiction, for example, a provincial governor [*praeses* q.v.]. *See D.*2.1.

Ius Civile (Civil Law). The original basic rules, principles, and institutions of Roman law, deriving from the various kinds of statute [*lex, senatus consultum, constitutio*

qq.v.] and from juristic interpretation. They were applicable directly only to Roman citizens, but in 212 A.D. the *constitutio Antoniniana* conferred citizenship on most of the inhabitants of the empire. The expression is sometimes used in a more philosophical sense to mean the law peculiar to any community or people, whatever its source. Cf. *ius gentium* and *ius honorarium*. *See D.*1.1.

Ius Gentium. The original meaning of this term was probably the body of rules, principles, and institutions developed in the late republic to cover commercial dealings with peregrines [*peregrinus* q.v.] and other noncitizens, who could not use the civil law [*ius civile* q.v.]. Its development may be connected with the peregrine praetor [*praetor* q.v.]. Less formalistic and more sophisticated than the civil law, it came to have a more philosophical sense of the law which was common to all peoples and communities, although its detailed provisions were Roman in character and treated as ordinary rules of law. Cf. *ius civile*. *See D.*1.1.

Ius Honorarium (Praetorian Law). The law introduced by magistrates, especially the praetor [*praetor* q.v.] by means of his Edict [*edictum* q.v.], to aid, supplement, or correct the existing civil law [*ius civile* q.v.]. It provided a large number of remedies which were often preferable to the civil law ones, for example, in the field of succession. *See bonorum possessio*. In juristic writings it was commonly treated as distinct from the civil law, although both were simply parts of Roman law as a whole. Cf. *ius civile*.

Iusiurandum (Oath). Oaths were used in a number of contexts. (a) In general, a party could choose to swear an evidential oath before a judge [*iudex* q.v.]. But certain oaths were compulsory, for example, as to the value of the property claimed and that *calumnia* [q.v.] was absent. *See D.*12.2, 3. (b) In certain actions, the parties could challenge each other to swear oaths as to the validity of their cases. If the challenge was refused, the person refusing lost his case, bringing the trial to a speedy conclusion. This type of oath was called "necessary." *See D.*12.2. (c) In any action, a party could offer to swear or challenge the other party to swear to the validity of his case. The challenge need not be accepted, but if it was, an action or defense of oath was allowed in any subsequent proceedings. Here the oath was called "voluntary." *See D.*12.2. (d) An oath was required of a slave about to be manumitted [*manumissio* q.v.] that he would promise to perform certain services for his former master [*patronus* q.v.]. *See D.*38.1.7.

Ius Naturale (Natural Law). A vague expression in Roman law. At times it was merely a synonym for the term *ius gentium* [q.v.]. It often means that the rule or principle in question was thought of as based on everyday experience, referred to as "natural reason" [*naturalis ratio*]. Sometimes it refers to the justice or fairness of a rule, but the view of natural law as a universal ideal order in any way contrasted with positive law is almost entirely absent. *See D.*1.1.

Legatus (Legate). A term with a number of meanings. (a) An ambassador. Such a person on an imperial mission was called a *legatus Augusti (Caesaris)*. *See D.*50.7. (b) The deputy of a provincial governor [*proconsul* q.v.] with special delegated jurisdiction. *See D.*1.16. (c) A type of provincial governor was called a *legatus Augusti (Caesaris) pro praetore*. *See D.*1.18.1. (d) The commander of a legion.

Legitimus Heres. *See Heres*.

Lenocinium. *See Stuprum*.

Lex. (a) A statute passed by one of the popular assemblies of republican times. It normally took the gentile (middle) name of the proposer or proposers, the subject matter of the legislation sometimes also being indicated in the title, for example, the *Lex Cornelia* on Guarantors, the *Lex Fufia Caninia*. In the early empire some leg-

islation was passed in this way, but the practice was obsolete by the end of the first century A.D. Thereafter, *lex* is often used of any piece of imperial legislation. *See* *D.*1.3,4. (b) The term also occurs in connection with the *Twelve Tables* [*lex duodecim tabularum*], a collection of early rules traditionally dating from c. 450 B.C., and drawn up by ten commissioners, the *decemviri.* It is not extant, but there are many references to its supposed provisions in the *Digest* and other legal and literary sources. *See* *D.*1.2.4.–6. (c) A special clause in a contract, for example, the *lex commissoria,* which allowed a seller to call off the sale if the price was not paid by a certain time. *See* *D.*18.3.

Libertinus, Libertus (Freedman). A former slave who, on manumission [*manumissio* q.v.], became a freeman and a Roman citizen, though with extensive public law disabilities. He had many duties toward his former master, his patron [*patronus* q.v.]. An imperial freedman [*libertus Caesaris*] manumitted by the emperor, often obtained high governmental office in the early empire. *See* *D.*38.1–5.

Lictor (Lictor). An attendant of a higher magistrate with *imperium* [q.v.], whose main duty was to escort him during public appearances.

Maiestas. This term was applied to a number of criminal offenses including treason, sedition, and desertion. In the empire it covered any action which endangered the emperor or his family. The earlier crime of betrayal to an enemy, *perduellio,* was eventually held to be merely a way of committing this offense. *See* *D.*48.4.

Manumissio (Manumission). The release of a slave by his master during the latter's lifetime or in his will. *See* *D.*40.1–9.

Metallum (Mine). Condemnation to work in a mine was a capital punishment [*capitalis* q.v.] only slightly less serious than the death penalty. There was a milder form known as *opus metalli. See* *D.*48.19.

Minor. A person over the age of puberty [*impubes* q.v.] but under the age of twenty-five. Such persons who were independent [*sui iuris* q.v.] had in classical times full legal capacity, though they could be protected by a grant of *restitutio in integrum* [q.v.]. In later law, the development of the institution of *cura* [q.v.] gave them more protection but some disabilities. *See* *D.*4.4; *D.*26.7,8.

Missio in Possessionem. A remedy granted originally by the *praetor* [q.v.] allowing a person to take over in whole or in part the property of another with various legal results. It had many uses, for example, to protect a creditor's interest after judgment or where property was threatened by the ruinous state of that of a neighbor. *See* *D.*42.4; *D.*39.2.

Munera. Certain public services which every person was bound to perform on behalf of his community or state. Some services were personal, for example, tutelage [*tutela* q.v.], others were burdens on property. Certain taxes were included under this term, and money payments could often be made in lieu of actual labor, for example, in maintaining public roads. The grounds for exemption [*excusatio*] from most of these services were limited. *See* *D.*50.4.

Naturalis Ratio. See Ius Naturale.

Negotiorum Gestio (Unauthorized Administration). The performance of some service on behalf of another person, without his request or authorization. If the action was reasonable in the circumstances, there was an action for compensation. *See* *D.*3.5.

Novatio (Novation). The extinction of one or more obligations by replacing it or them with a new obligation in the form of a stipulation [*stipulatio* q.v.]. *See* *D.*46.2.

Noxae Dare (To Surrender Noxally). To hand over a slave or animal as compensation to the victim of a delict committed by him. This alternative was open to an owner only where there had been no complicity on his part in the delict. *See D.*9.1,4.

Obsequium. See Patronus.

Occupatio (Occupation). The acquisition of ownership by taking possession of a thing not previously owned, such as a wild animal, or a thing which has been abandoned by its owner. *See D.*41.1.

Opus Metalli. See Metallum.

Opus Publicum. Forced labor on public works. This criminal punishment could only be imposed on *humiliores* [q.v.]. Condemnation for life meant loss of citizenship, but lesser terms did not affect status. *See D.*48.19.

Oratio (Oration). A proposal put forward by the emperor for legislation by means of a *senatus consultum* [q.v.]. The approval of the senate became a mere formality, so that the term came to mean a piece of direct imperial legislation, a type of *constitutio* [q.v.].

Pactum (Pact). Any agreement which did not come within one of the recognized categories of contract. Such an agreement was not generally actionable, but was accepted as a defense [*exceptio* q.v.]. However, pacts added to a recognized contract in order to modify its normal obligations were enforceable, as were certain pacts unconnected with any contract, for example, *constitutum debiti* [q.v.]. *See D.*2.14.

Paterfamilias (Head of the Household). The oldest ascendant male agnate [*agnatus* q.v.] in any family was its legal head. He exercised considerable powers over his sons, daughters, and other descendants, that is, those dependent [*alieni iuris* q.v.] on him. They were subject to his control in many matters relating to their persons, for example, marriage, and were incapable of owning property. Apart from certain kinds of *peculium* [q.v.] and some special categories of property in later law, all they acquired passed to their *paterfamilias*. The powers of a *paterfamilias* did not cease when the person subject to them reached majority. Often the word "father" [*pater*] is used in this sense.

Patria Potestas (Parental Power). The power of a *paterfamilias* [q.v.] over those dependent [*alieni iuris* q.v.] on him. In private law, the expression "in power" [*in potestate*] refers either to someone subject to this or the power of master over his slave. *See D.*1.7.

Patronus (Patron). The former master of a slave, who after manumission [*manumissio* q.v.] has become his freedman [*libertus* q.v.]. A patron had many rights over his freedman, particularly with regard to the performance of certain agreed services [*opera*] and in connection with succession. A freedman had to show respect [*obsequium*] to his patron and could not bring criminal proceedings against him or actions involving *infamia* [q.v.]. *See D.*37.14,15; *D.*38.1–4.

Pauperies. Damage done by an animal, without fault on the part of its owner. An action was given for the value of the damage done with the alternative of noxal surrender [*noxae dare* q.v.]. *See D.*9.1.

Peculatus. The misappropriation of public money or property by theft, embezzlement, or any other means. *See D.*48.13.

Peculium. The sum of money or property granted by the head of the household [*paterfamilias* q.v.] to a slave or son-in-power [*filiusfamilias* q.v.] for his own use. Although considered for some purposes as a separate unit, and so allowing a business run by slaves to be used almost as a limited company, it remained technically the

property of the head of the household. From the early empire onward, special kinds of *peculium* came into existence, the "military" [*castrense*] and the "quasi-military" [*quasi castrense*] *peculium*, which were considered for many legal purposes to be the property of a son-in-power himself. *See D.*15.1; *D.*49.17.

Perduellio. See Maiestas.

Peregrinus (Peregrine). In classical times this term usually meant a member of a non-Roman community within the empire, who was subject to the law of his own state and had few of the public or private law rights of a Roman citizen, for example, *conubium* [q.v.]. A special *praetor* [q.v.] dealt with peregrines' transactions. After the *constitutio Antoniniana* [*see ius civile*], the expression came to be applied to foreigners living outside of the empire.

Pignus. A contract of pledge under which the creditor obtained possession of the property pledged, but ownership remained with the debtor. The expression was sometimes used as a general one for any form of real security, including *pignus* and *hypotheca* [q.v.]. *See D.*13.7.

Pollicitatio (Unilateral Promise). A promise made to city or community to make a gift of money or to erect a public building or monument. Such a promise was legally binding in most cases as a matter of public law. *See D.*50.12.

Postliminium. The regaining of most of a person's private and public law rights on returning from capture by the enemy. The main exception in classical law was that a marriage usually did not automatically revive. *See D.*49.15.

Potestas. See Patria Potestas.

Praefectus (Prefect). The title of various kinds of high officials and military commanders in the empire. The most important of these were the praetorian prefects [*praefecti praetorio*], the chief military and civil advisors of the emperor and governors of the four great prefectures into which the later empire was divided. They also had extensive private law and (from the the third century A.D.) criminal law jurisdiction, the courts over which they presided being the highest in the empire. But the two urban prefects [*praefecti urbi*], one at Rome and later one at Constantinople, exercised independent criminal and civil jursidiction over their respective territories. Many of the lesser prefects in charge, for example, of the corn supply [*praefectus annonae*] or the city guard [*praefectus vigilum*], served under the urban prefect and their legal decisions could be appealed to him. The prefect of Egypt [*praefectus Augustalis* or *Aegypti*] was in a special position in a number of ways. *See D.*1.11,12,15,17.

Praelegare. To make a legacy of a specific thing to an heir [*heres* q.v.] in addition to his share of the inheritance.

Praeses (Governor). The general name for any provincial governor, who had judicial as well as administrative powers. *See D.*1.18.

Praetor (Praetor). In the republic, an important magistrate second only to the *consules* [q.v.], in charge of the administration of private law. As well as the urban praetor [*praetor urbanus*], probably the most important, there was also a peregrine praetor [*praetor peregrinus*] dealing with foreigners [*peregrinus* q.v.] and later there were a number of other judicial praetors dealing with specific issues [for example, *fideicommissum* q.v.]. However, because of the growth of a standard body of praetorian law [*ius honorarium* q.v.] leading to the consolidation of the Edict [*edictum* q.v.], these officials are referred to collectively in the texts as "the praetor." The praetor greatly extended and modified the civil law [*ius civile* q.v.] by means of his control over the Formulary System [*formula* q.v.] of civil litigation. Praetors continued to be appointed during the empire, but gradually their legal

functions were taken over by other officials such as the various kinds of prefect [*praefectus* q.v.] and the office became largely honorary. *See D.*1.2.27–34; *D.*1.14.

Praevaricatio. Collusion between the accuser [*accusatio* q.v.] and accused in a criminal trial to secure acquittal, or between a lawyer and his client's enemy. *See D.*47.15.

Precarium. A grant of the possession and general use of property made gratuitously and revocable at any time. *See D.*43.26.

Proconsul (Proconsul). A kind of provincial governor with civil and criminal jurisdiction. *See D.*1.16.

Procurator (Procurator). This term has a number of meanings. (a) The representative of a party in a civil trial. (b) A general manager of another person's business or other affairs. This position was often given to a freedman [*libertinus* q.v.] or a slave. Occasionally, the term was applied to an agent for a single transaction. An earlier type of business manager [*institor*] came to be considered a kind of procurator. *See D.*3.3; *D.*14.3. (c) Many imperial officials were called procurators, for example, a *procurator Caesaris*, originally a fiscal agent but later given many administrative duties. *See D.*1.19.

Quaestiones Perpetuae. Permanent criminal courts, each dealing with one class of offense, the penalty for it being fixed by the relevant statute [*lex* q.v.], which also usually set up the court itself. They had large juries, from whose verdict there was no appeal. The *Cognitio* [q.v.] System was sometimes an alternative. *See D.*48.18.

Quaestor (Quaestor). A magistrate whose office was created in the republic, whose duties were mainly connected with public finances and provincial administration. Their importance declined during the empire. *See D.*1.13.

Rei Vindicatio. See Vindicatio.

Relegatio (Relegation). A form of banishment either for a fixed period or in perpetuity. It did not necessarily involve loss of citizenship or confiscation of property, but merely exclusion from a specified territory. *See D.*48.22.

Repetundae. Extortion or unlawful acquisition of money or property by a person in an official position, such as a provincial governor. *See D.*48.11.

Rescriptum (Rescript). A written answer, issued by the imperial civil service on behalf of the emperor, to legal and administrative questions. These were sent in by officials and private individuals. In principle, such decisions were only binding in the case at issue, but they often came to be considered as of general application.

Restitutio in Integrum. A remedy granted originally by the *praetor* [q.v.] annulling the normal civil law [*ius civile* q.v.] effect of some event or transaction which had unfairly prejudiced a person's position. It had many uses as a remedy against fraud, or even, in the case of a *minor* [q.v.], a bad bargain in certain circumstances. *See D.*4.1,2,3,6.

Senator (Senator). A member of the senate [*senatus*], the most important assembly of the republic, with enormous and undefined advisory, deliberative, judicial, and later legislative powers [*senatus consultum* q.v.]. It was largely composed of ex-magistrates. During the empire the political importance of the senate declined, but senators and their families were considered to belong to the privileged senatorian class [*ordo senatorius*]. But certain legal disabilities were also involved, for example, marriage with a freedman [*libertus* q.v.] or woman was prohibited. *See D.*1.9.

Senatus Consultum. A decision of the senate [*senator* q.v.], which during the republic technically took the form of advice to a high magistrate, for example, the

praetor [q.v.], who would then normally incorporate it in a statute [*lex* q.v.] or the Edict [*edictum* q.v.]. In the early empire, these decisions came themselves to have legislative force. But the increasing role of the emperor in the proceedings [*oratio* q.v.] and the rise of other forms of imperial legislation [*constitutio* q.v.] gradually made the process and its name obsolete. *See D.*1.3.

Servitus (Servitude). A right exercised over property belonging to another. When attached to land or a building for the benefit of whoever owned it, for example, a person's right of way across land adjacent to his own, it was called a praedial [*praediorum*] servitude. Where the right was for the benefit of a particular person, for example, *usufructus* [q.v.], it was called a personal [*personarum*] servitude in later law. The holder of the servitude had an *actio in rem* [q.v.] to assert his rights, called an *actio confessoria.* A person denying that a servitude existed over his property had an action called an *actio negatoria* or *negativa* for this purpose. *See D.*7, *D.*8.

Servus Poenae. A person condemned to slavery as a punishment for a crime, including someone awaiting the death penalty. He was not considered to have a master, and could never be manumitted [*manumissio* q.v.].

Solidus or *Aureus* (Gold Piece). The standard gold coin of the later empire, used in the *Digest* to express any actual sum of money mentioned in the texts.

Statuliber. A slave whose manumission [*manumissio* q.v.] under a will was subject to some condition not yet fulfilled. *See D.*40.7.

Stipulatio (Stipulation). A unilateral verbal contract, concluded, in its original form, by a formal question put by the creditor to the debtor and his answer to it, for example, "Do you solemnly promise that one hundred gold pieces will be given to me?" "I solemnly promise." Any kind of obligation could be expressed in this form, and existing obligations could be reduced to it by novation [*novatio* q.v.], making it perhaps the most common type of Roman contract. No witnesses were required, but it became the usual practice to record the stipulation in writing [*cautio* q.v.]. This was never legally necessary, and the question of whether the *cautio* was considered probative in later law is disputed. The appropriate action on a stipulation was usually a *condictio* [q.v.], although for some purposes there was an *actio ex stipulatu. See D.*45.1.

Stuprum. This term covered a range of sexual offenses from illicit intercourse with a respectable unmarried woman or widow to homosexual rape.

Substitutio (Substitution). The appointment of another heir [*heres* q.v.] or heirs to cover the possibility that the one first instituted might not or could not accept the inheritance, which would make the will void. *See D.*28.6.

Sui Iuris (Independent). Free from the parental power [*patria potestas* q.v.] of another. Where such a person was an *impubes* [q.v.], he would be subject to tutelage [*tutela* q.v.]. In later law, if a *minor* [q.v.], he would be in care [*cura* q.v.].

Superficies. The right to the surface of land belonging to another, originally only a public body, for building or other purposes in return for a rent. *See D.*43.18.

Supplicium Ultimum. An aggravated form of the death penalty, for example, by crucifixion or being thrown to wild beasts. *See D.*48.19.

Suus et Necessarius Heres. See Heres.

Suus Heres. See Heres.

Tergiversatio. See Accusatio.

Testamenti Factio. The right to make, take under, or witness a Roman will. *See D.*28.1.

Transactio. The compromise of legal proceedings, actual or contemplated, in return for payment or other consideration. *See D.*2.15.

Tutela (Tutelage). A form of guardianship over the person and property of an *impubes* [q.v.] exercised by a tutor appointed in various ways. The powers of the tutor varied according to the age of the child, being greater when he was an *infans* [q.v.]. The tutor was accountable at the end of his period in office, that is, when his ward reached puberty. It was considered a public duty [*munera* q.v.], though many exemptions from it were recognized. *See D.*26, *D.*27.

Tutor. See Tutela.

Twelve Tables. See Lex.

Usucapio (Usucapion). The acquisition of ownership by possession of property for a specified period of time and under certain conditions, for example, that the possession was in good faith. *See D.*41.3.

Usufructus (Usufruct). The right to use the property of another and take its fruits or profits [*fructus*] without diminishing its capital value. It was a personal servitude [*servitus* q.v.]. *See D.*7.1–6,9.

Usus (Right of Use). The right to use the property of another without taking its fruits or profits. It was a personal servitude [*servitus* q.v.]. *See D.*7.8.

Verberatio. See Castigatio.

Vicarius. (a) In private law, a substitute for another person or an underslave, a slave who is part of the *peculium* [q.v.] of another slave. (b) In public law, many kinds of deputy were given this name, as well as certain provincial governors of the late empire.

Vindicatio. A term commonly used for the action claiming ownership of property, its full title being *rei vindicatio.* It was sometimes also used to cover other kinds of mainly real actions [*actio in rem* q.v.]. *See D.*6.1.

Vis (Force). This expression has two different meanings: (a) In private law, it covered any action which might provoke fear [*metus*] in another, whether involving actual violence or not. Many of the interdicts [*interdictum* q.v.] of the *praetor* [q.v.] dealt with this matter. (b) In criminal law, it meant various kinds of violent assault and public disturbance, although it was also applied to certain offenses committed by officials. *See D.*4.2., *D.*43.16.

BOOK FORTY-ONE

1

ACQUISITION OF OWNERSHIP OF THINGS

1 GAIUS, *Common Matters or Golden Things, book 2:* Of some things we acquire ownership under the law of nations which is observed, by natural reason, among all men generally, of others under the civil law which is peculiar to our city. And since the law of nations is the older, being the product of human nature itself, it is necessary to treat of it first. 1. So all animals taken on land, sea, or in the air, that is, wild beasts, birds, and fish, become the property of those who take them,

2 FLORENTINUS, *Institutes, book 6:* as also their offspring born when they are ours.

3 GAIUS, *Common Matters or Golden Things, book 2:* What presently belongs to no one becomes by natural reason the property of the first taker. 1. So far as wild animals and birds are concerned, it matters not whether they be taken on one's own or on someone else's land. Of course, a person entering another's land for the purpose of hunting or fowling can, if the latter becomes aware of it, lawfully be forbidden entry by the landowner. 2. Any of these things which we take, however, are regarded as ours for so long as they are governed by our control. But when they escape from our custody and return to their natural state of freedom, they cease to be ours and are again open to the first taker,

4 FLORENTINUS, *Institutes, book 6:* other than those tamed creatures which are in the habit of going and returning.

5 GAIUS, *Common Matters or Golden Things, book 2:* An animal is deemed to regain its natural state of liberty when it escapes our sight or, though still visible, is difficult of pursuit. 1. The question has been asked whether a wild animal, so wounded that it may be captured, is already ours. Trebatius approved the view that it becomes ours at once and that it is ours so long as we chase after it; but, if we abandon the chase, it ceases to be ours and is open to the first taker. Hence, if, during the period of our pursuit, someone else should take the animal, with intent to profit thereby, he is to be regarded as stealing from us. The majority opinion was that the beast is ours only if we have actually captured it because many circumstances can prevent our actually seizing it. And that is the sounder opinion. 2. Bees, again, are wild by nature and so those which swarm in our tree are, until housed by us in our hives, no more regarded as ours than birds which make a nest in our tree. Hence, if another should house or hive them, he will be their owner. 3. Again, honeycombs which they make can be taken by anyone with no question of theft though, as said earlier, one entering upon another's land can be lawfully barred by the owner who becomes aware of it. 4. A swarm which flies away from our hive is deemed still to be ours so long as we have it in sight and its recovery is not difficult; otherwise, it is open to the first taker. 5. The wild nature of peacocks and doves is of no moment because it is their custom to fly

away and to return; bees, whose wild nature is universally admitted, do the same; and there are those who have tame deer which go into and come back from the woods but whose wild nature has never been denied. In the case of these animals which habitually go and return, the accepted rule is that they are held to be ours so long as they have the instinct of returning; but if they lose that instinct, they cease to be ours and are open to the first taker. They are deemed to have lost that instinct when they abandon the habit of returning. 6. Poultry and geese are not wild by nature; for there obviously exist other species which are wild fowl and wild geese. Hence, if my geese or chickens be disturbed and fly so far away that I do not know where they are, nonetheless they remain my property so that anyone who takes them with a view to gain will be liable to me for theft. 7. Again, property taken from the enemy is forthwith the property of the taker under the law of nations,

6 FLORENTINUS, *Institutes, book 6:* so also are the young of animals which we own under the same law,

7 GAIUS, *Common Matters or Golden Things, book 2:* so that also freemen are reduced to slavery but those who escape the power of the enemy regain their original freedom. 1. Furthermore, what the river adds to our land by alluvion becomes ours by the law of nations. Addition by alluvion is that which is gradually added so that we cannot, at any given time, discern what is added. 2. But if the force of the river should detach part of your land and bring it down to mine, it obviously remains yours. Of course, if it adheres to my land, over a period of time, and trees on it thrust their roots into my land, it is deemed from that time to have become part of my land. 3. An island arising in the sea (a rare occurrence) belongs to the first taker, for it is held to belong to no one. An island arising in a river (a frequent occurrence), if indeed it appears in the midstream of the river, is the common property of those who have holdings on either bank of the river to the extent that those holdings follow the bank; but if it lies to one side of the river rather than the other, it belongs only to those who have holdings on that bank. 4. Now if a river should burst one bank and partly begin to flow in another channel and then this new stream return to the old channel, the land converted into an island by the two streams naturally remains the property of its former owner. 5. But if, wholly abandoning its natural bed, a river begins to flow along another course, the original bed becomes the property of those with holdings on the former banks to the extent of those holdings along the bank; the new bed, though, acquires the same character as the river itself, that is, it becomes public under the law of nations. But if, after some time, the river reverts to its former bed, the later bed again becomes the property of those with holdings along its bank. However, if the new bed occupies the whole of some person's land, then, even though the river returns to its original bed, the man whose land it was, strictly speaking, has no right in the newly

abandoned bed, because the relevant piece of land ceased to exist with the loss of its shape and form and, since the erstwhile owner has no neighboring land, he cannot have any interest in the bed by right of proximity; but it is scarcely likely that this argument would prevail. 6. It is quite a different matter when one's land is wholly flooded; for inundation does not change the aspect of the land; and so, when the waters recede, the land manifestly remains the property of its existing owner. 7. When someone makes something for himself out of another's materials, Nerva and Proculus are of opinion that the maker owns that thing because what has just been made previously belonged to no one. Sabinus and Cassius, on the other hand, take the view that natural reason requires that the owner of the materials should be owner of what is made from them, since a thing cannot exist without that of which it is made. Let us say, by way of example, that I make some vase from your gold, silver or copper or a ship, cupboard or benches from your timber, a garment from your wool, mead from your wine and honey, a plaster or eye-salve from your drugs, wine, oil, or flour from your grapes, olives, or ears of corn. There is, however, the intermediate view of those who correctly hold that if the thing can be returned to its original components, the better view is that propounded by Sabinus and Cassius but that if it cannot be so reconstituted, Nerva and Proculus are sounder. Thus, a finished vase can be again reduced to a simple mass of gold, silver, or copper; but wine, oil, or flour cannot again become grapes, olives, or ears of corn; no more can mead be reconstituted as wine and honey or the plaster or salve as the original drugs. In my view, however, there are those who rightly say that corn threshed from someone's ears of corn remains the property of the owner of the ears; for since the corn already has its perfect form while in the ears, the thresher does not make something new, but merely uncovers what already exists. 8. When two owners willingly mix their goods, the resultant whole is their common property, whether those goods be of the same kind, as when wines are mixed or bars of silver worked together, or different, as when one contributes wine and the other honey or one gold and the other silver; this, despite the fact that the mead or the alloy has a new identity. 9. The same holds good, even if this should happen without the consent of the two owners, whether of different or of similar materials. 10. When someone builds on his own site with another's materials, he is deemed to be owner of the building because all that is built on it becomes part of the soil. However, the owner of the materials does not thereby lose his ownership of them; but he meanwhile cannot bring a *vindicatio* for them or an action for their production by reason of the *Law of the Twelve Tables* which provides that no one is required to give up materials of another built into his premises but that he must pay double their value. The term used is "beam" but, in fact, covers any building materials. Hence, if the house should collapse for some reason, the owner of the materials can have a *vindicatio* for them and have an action for their production. 11. The very proper question has been raised whether, if the builder sells the premises and the building collapses after the purchaser has usucapted it, their owner can still have a *vindicatio* for the materials. The occasion for doubt is whether, when the whole is usucapted as such, its individual parts are also usucapted. That idea did not commend itself. 12. Conversely, if a person were to build with his own materials on someone else's site, he would make the building the property of the owner of the site, and if he knew that the site belonged to another, he would be treated as voluntarily parting with his materials so that even if the house should collapse, he would have no *vindicatio* for them. Of course, if the owner of the site were to claim the building but was unwilling to pay the value of the materials or the workers' wages, he could be resisted with the defense of bad faith, assuming the builder to have been unaware that the site belonged to someone else and to have genuinely built as though on his own land; but, if he knows the facts, his own fault will be imputed to him; for he rashly built on what he knew to be another's land. 13. If I plant someone else's cutting in my land, it will be mine; conversely, if I

plant my own cutting in someone else's land, it will be his, provided, in each case, that it roots itself. For until it takes root, it remains the property of its former owner. It follows that if I so pack earth around a neighbor's tree that it puts forth its root into my land, the tree becomes mine; for reason does not tolerate the idea that a tree should belong to anyone other than the person in whose land it is rooted. Hence, a boundary tree, if it extends roots into the adjoining land, belongs to both neighbors in common

8 MARCIAN, *Institutes, book 3:* to the extent of their holdings. But if a stone appears on a boundary and the lands are common in undivided shares, then the stone will similarly be common property, if removed from the earth.

9 GAIUS, *Common Matters or Golden Things, book 2:* By the same reasoning that cuttings implanted in land become part of it, so seeds and corn sown in land become part of it. But just as one who builds on another's land can defend himself with the plea of bad faith, if the owner of the site claims the building, so can a man have the same defense who has sown another's land at his own expense. 1. Letters, even in gold, accede to the paper or parchment just as things built or sown become part of the land. Thus, if I wrote verse or a story or a speech on your paper or parchment, not I but you would be held to own the finished work. But should you claim your book or parchment from me but be unwilling to pay my writing expenses, I can, if I acquired your materials in good faith, resist you with the defense of bad faith. 2. Pictures do not accede to the tablets on which they are painted in the same way as writing to paper or parchment. On the contrary, the view established itself that the tablet accedes to the picture. Still it is appropriate that the owner of the tablet should be given an *actio utilis*, which he can bring to effect against the painter in possession of the tablet, if he pays the cost of the painting; in other circumstances, he will be met by the defense of bad faith; if it were a possessor in good faith who paid for and painted the tablet, we would give him a direct *vindicatio* against the owner of the tablet on his paying the value of the tablet; otherwise, he could be resisted with the defense of bad faith. 3. Those things, again, which are delivered to us become ours under the law of nations; for nothing is so conformable to natural equity as that effect should be given to the wishes of an owner wanting to transfer his thing to someone else. 4. It is of no consequence whether the owner delivers the thing personally or through someone acting on his behalf. Hence, if that other has been given free administration of the affairs of the owner, who is going on a journey, and he sells and delivers something, he makes it the property of the recipient. 5. Sometimes, indeed, the bare intent of the owner, without actual delivery, is sufficient to transfer a thing, as when I sell you something that I have already lent or let to you or deposited with you; for although I did not place the thing with you for that reason, now the fact that I allow it to remain with you on the ground of sale makes it yours. 6. Again, if someone sells the contents of a warehouse and, at the same time, hands over the keys of the warehouse to the purchaser, he transfers to him ownership of the contents. 7. Going even further, the will of the owner may confer ownership on an unidentified person; this is so when he showers largesse on a mob; he does not know who will pick up what, but because he wishes

anyone who picks something up to keep it, he makes him owner thereof forthwith. 8. It is another matter with those things which are jettisoned in stress of seas to lighten the vessel; they remain the property of their owners; for they are not cast overboard because the owner no longer wants them, but that the ship may have a better chance of riding the storm. Consequently, if anyone finds any such things washed up by the waves or, for that matter, in the sea itself and appropriates them with a view to gain, he is guilty of theft.

10 GAIUS, *Institutes, book 2:* We can make acquisitions not only personally and directly but also through those whom we have in power through slaves in whom we have a usufruct and through freemen and slaves of others whom we possess in good faith; all of these we will look at more carefully. 1. Anything which our slaves receive by delivery and anything which they acquire, whether on a stipulation or on any other ground, is acquired by us; for a person in the power of another can hold nothing for himself. Hence, if he be instituted someone's heir, the slave cannot accept the inheritance without our direction, and if, at our bidding, he does accept the inheritance, it becomes ours just as if we ourselves had been appointed as heirs. So also a legacy is acquired for us through the slave. 2. Not only ownership but also possession do we acquire through those in our power; for anything of which they take possession, we are deemed to possess. Thus, by their long possession, we also acquire ownership. 3. In respect of those slaves, however, in whom we have only a usufruct, the view established itself that we acquire whatever they obtain through our resources or through their own labors; but their acquisitions from any other source belong to their owner. Hence, if such slave is instituted an heir or given a legacy or gift, these things go not to me, the usufructuary, but to the owner of the slave. 4. The same rule as for the fructuary slave obtains for one whom we possess in good faith, be he free or in fact another's slave, as also for the possessor in good faith. Thus, anything that the man acquires other than under those two heads belongs to himself, if he be a freeman, or, if he be a slave, to his owner. 5. When a possessor in good faith usucapts a slave, he can, since he thus becomes his owner, acquire for himself through him on any ground; the usufructuary, on the other hand, cannot usucapt the slave, first because he does not possess him but has only the right to use and enjoy him and, second, because he knows the slave to belong to someone else.

11 MARCIAN, *Institutes, book 3:* A *pupillus*, for the purpose of making an acquisition, does not require the authority of his tutor; but he can alienate nothing without the presence of his tutor giving *auctoritas*, not even possession, which is a matter of fact; this was the view of the Sabinians and it is correct.

12 CALLISTRATUS, *Institutes, book 2:* Although a lake or pool may sometimes spread, sometimes dry up, it still retains its bounds and so no right of alluvion is recognized. 1. If something be made from the fusing of my copper and your silver, the thing is not our common property because, though copper and silver are different elements, they can be separated by craftsmen and returned to their original nature.

13 NERATIUS, *Rules, book 6:* If my procurator buys something for me at my behest and it is delivered to him in my name, ownership, that is, property, in it is acquired by me although I am unaware of the delivery. 1. In like manner, the tutor of a *pupillus* or *pupilla*, by purchasing in the name of that ward, acquires ownership for him or her, although he or she knows nothing about the transaction.

14 NERATIUS, *Parchments, book 5:* What a man erects on the seashore belongs to him; for shores are public, not in the sense that they belong to the community as such but that they are initially provided by nature and have hitherto become no one's property. Their state is not dissimilar to that of fish and wild animals which, once caught, undoubtedly become the property of those into whose power they have come. 1. We have then to consider the legal position of the site, if the building erected on the shore comes down; does it remain the property of the builder, or does it revert to its original state, so that it is public again as though nothing was ever built upon it? This latter is the better way of looking at the matter, so long as the original form of the shore is restored.

15 NERATIUS, *Rules, book 5:* But one who builds on the bank of a river does not make it his own.

16 FLORENTINUS, *Institutes, book 6:* In the case of lands measured out, it is generally agreed that the right of alluvion has no place. The deified Pius ruled to this effect and Trebatius says that land granted to defeated enemies on the condition that it becomes civic property does have the right of alluvion and is not measured out; but, in the case of land taken by force it is measured out so that it might be known what was given to whom, what was sold, and what remained public property.

17 ULPIAN, *Sabinus, book 1:* If two owners deliver a thing to their common slave, he acquires for each from the other.

18 ULPIAN, *Sabinus, book 4:* The heir cannot acquire through a slave belonging to the inheritance anything which is part of the inheritance and certainly not the inheritance as such.

19 POMPONIUS, *Sabinus, book 3:* If a freeman, in good faith, be acting as my slave, Aristo says that what he obtains through his own labors or my resources becomes mine beyond any doubt; but what he receives by gift or some transaction belongs to him. But an inheritance or legacy is not acquired for me through him; for it does not arise from his labors or my resources; he does nothing in respect of the legacy though he does in the case of an inheritance to the extent that he does make acceptance (a

point once doubted by Varius Lucullus); still the better view is that I do not acquire it through him, even though the testator may have intended me to benefit by it. But although the man's seeming owner does not acquire the estate in any way, nonetheless, it should be made over to him, if that was the manifest wish of the testator. Trebatius says that where a freeman, genuinely acting as a slave, accepts an inheritance at the direction of his seeming owner, he himself becomes heir because it is what he does and not what he thinks that makes him heir. Labeo holds differently, if he acted under pressure; but if he too wished to accept, then he becomes heir.

20 ULPIAN, *Sabinus, book 29:* Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient. 1. Now whenever ownership is transferred, it passes to the transferee in the same case as it was with the transferor; if the land was subject to a servitude, it passes with the servitude; if it was unencumbered, it passes in that state; and if, perchance, there should be servitudes due to the land, it passes with the servitudes due. Hence, if someone declared land to be unencumbered when he conveyed it and it was in fact subject to a servitude, he would in no way affect the validity of the servitude; but he would place himself under an obligation and have to make reparation for his assertion. 2. If Titius and I buy something and it is delivered to Titius as being my procurator, I think that I also acquire ownership because it is accepted that possession and, through it, ownership of anything can be acquired through a free person.

21 POMPONIUS, *Sabinus, book 11:* Proculus says that if my slave is serving you in good faith and buys and takes delivery of something, it does not become mine, because I am not in possession of the slave, and it does not become yours, because it was not bought with your resources. But if a freeman serving you in good faith buys something, it becomes his own. 1. If you are in possession of something of mine and I wish it to become yours, it will be yours, even though I am not in possession of it.

22 ULPIAN, *Sabinus, book 40:* No one possessing a slave by force, stealth, or *precarium* can acquire anything which the slave receives or for which he stipulates.

23 ULPIAN, *Sabinus, book 43:* When a man, be he free or someone else's slave, serves a person in good faith, anything that he acquires with that person's resources, he acquires for the person whom he is serving. So also does he acquire for him anything which he obtains by his own labors; for, in a way, his services are part of that person's resources, since by law he owes his service to one whom he serves in good faith. 1. Such acquisition, however, is effected only so long as he is serving in error in good faith. Let us, then, see for whom he acquires if he learns that he belongs to someone else or is in fact free. The issue here is whether we look to the beginning of the matter or to individual occasions; and it is more proper for us to take the latter course. 2. It is to be said generally that what he cannot acquire for his master in good faith from the latter's resources he will acquire for himself and what he cannot acquire for himself not from the latter's resources, he acquires for the person to whom he is in servitude in good faith. 3. If the man be serving two masters in good faith, he acquires for both, but for each separately with that one's resources. But in the case of what comes through the resources of one, let us see whether he acquires partly for his master in good faith and partly for his owner, if he is a slave, or for himself, if he is a freeman in servitude in good faith, or whether he should acquire exclusively for the person whose resources are used. Scaevola treats of this issue in the second book of his *Questions*, and he says that if another's slave is serving two masters in good faith and he makes some acquisition with the resources of one of them, reason requires that he acquires

only for that one. If he adds the name of the one for whom he stipulates, there can, he says, be no doubt that he acquires only for the person named; for even if he should stipulate in respect of that one's resources in the name of his other master, by the very fact of stipulating in his name, he would acquire the whole for him. He approves elsewhere that if he should stipulate in connection with my resources, even though without naming me and without my direction, when he is serving me among others, he acquires solely for me. For it has been accepted that whenever a slave held in common cannot acquire for all his masters, he acquires only for the one for whom he can do so. Frequently, I have reported Julian so to hold and that is the rule which we observe.

24 PAUL, *Sabinus, book 14:* It must be said of all things which cannot be restored to their original form that if the material remains though the form only is changed, as if you make a statue from my copper or a goblet from my silver, I remain owner of the objects,

25 CALLISTRATUS, *Institutes, book 2:* unless what was done was done in another's name with the owner's consent; for then, because of the owner's consent, the thing belongs wholly to him in whose name it is made.

26 PAUL, *Sabinus, book 14:* But if you make a ship with my planks, the ship is yours because the cypress wood no longer exists, as is also the case when some garment is made from wool; for there is now a thing made of cypress or of wool. Proculus intimates that we accept the view of the law which commended itself to Servius and Labeo. For them, we have to look at the overall character, so that if something be added, it becomes part of the whole. Thus, if a foot or a hand be added to a statue, a base or handle to a goblet, a post to a couch, a plank to a vessel, stone to a building, the whole belongs to the erstwhile owner of the statue, and so forth. 1. A tree, wholly uprooted and put in another place, remains the property of its former owner until it takes root, but once it takes root, it becomes part of the land where it does so, and should it be again uprooted, it does not revert to its former owner; for it has conceivably altered through nourishment in other soil. 2. If you dye my wool, the now purple wool nonetheless remains mine according to Labeo; for there is no distinction between dyed wool and that which, falling into mud or mire, loses its original color.

27 POMPONIUS, *Sabinus, book 30:* It is not to be said that the whole of the silver is yours, if you add some of another's unwrought silver to your own; but if, on the other hand, you solder your goblet with someone else's lead or you weld it with another's silver, there is no doubt that the goblet is yours and that you can lawfully bring a *vindicatio* in respect of it. 1. When several ingredients are contributed together to produce a single medicament or if we produce an unguent from various essences, neither former owner can say that the resultant product is his; it is thus overwhelmingly better to say that it belongs to him in whose name the compound was made. 2. If it be asked which cedes to the other, when elements belonging to each of two owners are welded together, Cassius says that an assessment is to be made of the respective portions of the final product or of the value of each element. But if there be no obvious accession of the one element to the other, we have to consider whether the product should not be declared the property of both, as in the case of a conflated mass, or rather that of him in whose name the welding was done. Proculus and Pegasus, however, hold that each retains his own material.

28 POMPONIUS, *Sabinus, book 33:* If your neighbor builds upon your wall, Labeo and Sabinus say that the product belongs to the builder. Proculus, however, says that it is yours alone, as that becomes yours which another builds on your soil. And his opinion is the more correct.

29 PAUL, *Sabinus, book 16:* An island arising in a river does not become the undivided

property of those who hold lands on one bank of the river, but is divided according to their particular areas. For each of them will hold it in appropriate areas to the extent that each previously held the bank, as though a straight line were drawn through the island.

30 POMPONIUS, *Sabinus, book 34:* Hence, if an island arising should pertain to my land and I sell the lower part of the plot to which no part of the island was fronting, no part of the island will belong to the purchaser for the reason that it would not have become his even if, at the time that the island arose, he was then owner of that part of the plot. 1. The younger Celsus says that if a tree should grow up on the bank of a river which marches with my land, it is mine because the land is my exclusive private property, although its use is regarded as public. Hence, when the riverbed dries up, it becomes the property of the neighboring owners because the public no longer avails itself of it. 2. There are three ways in which an island arises in a river: One is when the river flows around land which was not part of the bed; another is where land, part of the riverbed, is left dry by the river which begins to flow round it; the third is when the river, by gradual deposit, creates a higher part above the bed and augments it by alluvion. In each of the latter two cases, the island belongs only to him whose land was the closer when the island first appeared; for it is the nature of a river that a change in its course changes the character of its bed. And it matters not whether the issue be one only of the change of the riverbed or of the superfusion of ground and land; for each is in similar case. But, in the first case, no alteration in ownership is thereby effected. 3. Alluvion restores the land which the river wholly removed. Hence, if land lying between a public road and the river had been flooded by the river, whether gradually or not, but reappeared with the recession of the river waters, it would belong to its original owner; for rivers serve as public functionaries, making public that which was private and private that which was public. Thus, just as this land was public while it formed the riverbed, so on becoming private, it should belong to its former owner. 4. If I drive piles into the sea and build upon them, the building is immediately mine. Equally, if I build on an island arising in the sea, it is mine forthwith; for what belongs to no one is open to the first taker.

31 PAUL, *Edict, book 31:* Bare delivery of itself never transfers ownership, but only when there is a prior sale or other ground on account of which the delivery follows. 1. Treasure is an ancient deposit of money, memory of which no longer survives, so that it is without an owner; thus, what does not belong to another becomes the property of him who finds it. For the rest, if someone should hide something in the ground for gain or out of fear or for safekeeping, it is not treasure and to take it would be theft.

32 GAIUS, *Provincial Edict, book 11:* We acquire, even unwillingly, through our slaves on virtually every ground.

33 ULPIAN, *Disputations, book 4:* Marcellus, in his twentieth book, in respect of a legacy to a slave who is part of a *peculium castrense*, or a stipulation by the slave before the acceptance of the inheritance of the soldier son-in-power, treats of the question, from whose person the legacy or stipulation will take effect. I think that the more correct view is that of Scaevola, which Marcellus also discusses, that is to say, that if the inheritance is in fact accepted, all is to be regarded as in respect of an inherited slave; if it is not accepted, as in respect of the father's own slave; and if a usufruct is left to the slave, it is to be regarded, now as offered to the father, now to the heir, and not as passing from the one to the other. 1. The same distinction may be taken if something is stolen from the *peculium*; one will say either that the action for theft is no longer his if the inheritance is accepted under the will, since there can be no theft from a vacant inheritance, or that the action for theft, as also the *condictio*, will be given to the father, if the inheritance is not accepted. 2. Whenever the slave of an inheritance takes a stipulation or receives something by delivery, his act is effective by virtue of the

personality of the deceased, as Julian maintains; his view has prevailed that the person to whom to look is the testator.

34 ULPIAN, *Census, book 4:* For the inheritance sustains the personality of the deceased, not that of the heir, as has been established by many instances taken from the civil law.

35 ULPIAN, *Disputations, book 7:* If my procurator or a tutor should deliver his own thing to someone, thinking it to be mine or the property of his *pupillus*, he does not lose ownership in it, and the alienation is null, since no one can lose his property through error.

36 JULIAN, *Digest, book 13:* When we indeed agree on the thing delivered but differ over the grounds of delivery, I see no reason why the delivery should not be effective; an example would be that I think myself bound under a will to transfer land to you and you think that it is due under a stipulation. Again, if I give you coined money as a gift and you receive it as a loan, it is settled law that the fact that we disagree on the grounds of delivery and acceptance is no barrier to the transfer of ownership to you.

37 JULIAN, *Digest, book 44:* A creditor cannot acquire possession through a slave who is in pledge to him because although he has possession of the slave, he can acquire nothing, whether by stipulation or delivery or in any other way, through that slave. 1. If one of several owners should make a gift of money to a slave whom they own in common, it is for that owner to determine on what basis he gives it to the slave. For if his intention be only that the money comes out of his own account to become part of the slave's *peculium*, the money will remain the property of the same owner; but if he gave the money to the common slave in the same manner that we are accustomed to make gifts to the slaves of others, it will become the common property of all the owners in the same shares which they have in the slave himself. 2. To prepare the ground for the next question, let us suppose that the co-owner so gives money to the common slave that he wishes it still to remain his property. If the slave should buy land with that money, that land will be the common property of his owners in proportion to their shares in him; for if a common slave should buy land even with stolen money, it would belong to the co-owners in the same manner. For it is not the case that a slave owned in common does not acquire also for the one owner what he obtains through the substance of the other, as it would be the case that a fructuary slave would not acquire for his owner what he gets through the resources of his usufructuary. But in the same way that the positions of the fructuary slave and the common slave differ in respect of acquisitions from extraneous sources in that in such case, the former does not acquire for his fructuary, while the latter does acquire for his owners, so also an acquisition made with the resources of the fructuary alone will belong to the fructuary exclusively; but an acquisition by a common slave, which is made with the resources of one owner, will belong to both owners. 3. By taking delivery in the name of only one owner, as also by stipulating only in his name, a common slave acquires exclusively for that owner. 4. Should the slave of a single owner say that he accepts delivery in the names of his owner and of Titius, he acquires part for his owner, and in part, his action is nugatory. 5. If a fructuary slave should say that he is accepting delivery simply for his actual owner, even though the acquisition be made through the resources of the fructuary, he acquires exclusively for his owner; equally, if he stipulated for his owner in relation to the fructuary's property, he would acquire solely for his owner. 6. You wish to make me a gift, and I tell you to make delivery to the slave whom I own in common with Titius, and the slave receives the thing with the intention of acting only for Titius; the transaction is void; for even if you deliver a thing to my procurator to make it mine and he receives it as for himself, the transaction is void. If, on the other hand, a common slave should receive a thing with the intention of making it the property of both his owners in similar circumstances, the transaction will be void in respect of the other owner.

38 ALFENUS VARUS, *Digest, Epitomized by Paul, book 4:* Attius had a property adjoining a public road; beyond the road lay a river and the holding of Lucius Titius. The river gradually flowed over and ate away the land lying between the road and the

river and made away with the road and then gradually receded and, by alluvion, returned to its former bed. The opinion was that the river having destroyed the land and the public road, the land so destroyed became the property of the man who held the land beyond the river [that is, Lucius Titius]; but later, when the river slowly receded, it took the restored land away from the man who had acquired it and added it to that of the owner beyond the road [that is, Attius], since his land was nearest to the river; but what had been public became no one's property. And he said further that the road did not prevent the land again exposed, with the recession of the river, on the other side of the road from becoming the property of Attius, since the road itself was part of his land.

39 JULIAN, *From Minicius, book 3:* Even a stolen slave acquires, for the person who buys him in good faith, what he stipulates for or receives by delivery in respect of his purchaser's property.

40 AFRICANUS, *Questions, book 7:* The following question has been put: suppose that a person to whom a freeman is in servitude in good faith dies and that his heir is aware that the seeming slave is free; can the heir acquire anything through that man? [Julian] says that in no way can the heir be regarded as a possessor in good faith, since he assumes possession in the knowledge that the man is free; for equally, if a man should devise his own land, an heir who has knowledge of the bequest could, beyond all doubt, acquire no ownership in the fruits of that land; the case is still stronger if the testator should simply be the purchaser in good faith of another man's slave. In consequence, says [Julian], a like line of reasoning is to be adopted in respect of the services or labor of slaves so that, whether the slaves did not belong to the testator or, though his, they were specifically bequeathed or manumitted in his will, no acquisition can be effected through them for heirs who know the facts. In general, indeed, he says that the two issues go together so that where a possessor in good faith becomes owner of produce of land which has been consumed, he will likewise acquire through a slave through the latter's services or in respect of his own property.

41 ULPIAN, *Edict, book 9:* It is the case that statues set up in a *civitas* do not belong to the citizens; so, Trebatius and Pegasus; still the praetor should ensure that what has been set up in a public place with the intent that it should be public should not be allowed to be removed by a private individual, not even by the person who erected it. The citizens, therefore, are to be protected, being given a defense against one who claims the statue and an action against one who possesses it.

42 PAUL, *Edict, book 11:* A substitution which does not yet lie is no part of a man's estate.

43 GAIUS, *Provincial Edict, book 7:* A slave who is possessed in good faith does not acquire for his possessor what he acquires with the substance of his true owner. 1. It is obvious that incorporeal things do not admit of delivery and usucapion. 2. When a slave, in whom another has a usufruct, buys and takes delivery of a slave, the question for whom he acquires him is in suspense until he pays the price; if he pays it out of a *peculium* from the fructuary, he is deemed to acquire for the fructuary, but should he use a *peculium* which follows his actual owner, the slave purchased, by relation back, is held to belong and to have belonged to his owner.

44 ULPIAN, *Edict, book 19:* The following case is discussed by Pomponius: When wolves were carrying off pigs from my swineherd, a farmer on a neighboring estate, with some strong and powerful dogs which he kept to protect his own herd, pursued the wolves and snatched the pigs away from them; that or the dogs tore them away; but when my swineherd claimed the pigs, the question arose whether the pigs had become the property of their rescuer or remained mine; for, in a way, the dogs got them by hunting. He, however, used to ponder whether, since animals caught on land or sea cease to belong to their captors on regaining their natural freedom, so also things captured from a man's property by wild animals of land or sea cease to be his, when the beasts elude his pursuit. Who indeed can say that what a bird, flying by, takes from my threshing-floor or land or snatches from me myself remains mine? If, then, ownership is so lost, the thing will belong to the first taker on being freed from the beast's mouth, just as a fish, wild boar, or a bird, which escapes from our power, will become the property of anyone else who seizes it. But he thinks that rather is it the case that the thing remains ours so long as it can be recovered; what he writes about birds, fish, and wild animals, however, is true. He also says that what is lost in

a shipwreck does not cease forthwith to be ours; indeed, a person who seizes it will be liable for fourfold its value. And it is certainly preferable to say that what is seized by a wolf remains ours so long as it can be retrieved. If, then, it does so remain, I am of opinion that even the action for theft will lie; for even if the farmer did not give chase with the intent to steal, though he may have had that intent, still, even assuming that he did not give chase with that intent, nevertheless, when he does not restore on request, he appears guilty of detaining and appropriating. Accordingly, I am of the view that he is liable to both the action for theft and that for production; and the pigs, when produced, can be reclaimed from him by a *vindicatio*.

45 GAIUS, *Provincial Edict, book 7:* If a common slave makes an acquisition with the resources of one of his owners, nonetheless, the thing becomes common property; but the owner whose resources were used will have a preferred claim for the sum in an action to divide the common property; for it accords with good faith that each should have a prior claim to what the slave acquires with his resources. But if the slave makes an acquisition from any other source, he acquires for all the co-owners to the extent of the share of each in him.

46 ULPIAN, *Edict, book 65:* There is no novelty in the fact that one who does not have ownership may yet confer ownership upon another; a creditor, for instance, in selling a pledge, gives title to an ownership which he does not himself have.

47 PAUL, *Edict, book 50:* An inheritance cannot be acquired by a slave for his fructuary because an inheritance is not in the sphere of a slave's labor.

48 PAUL, *Plautius, book 7:* A purchaser in good faith undoubtedly acquires ownership for the time being by gathering fruits, even those of someone else's property, not only the fruits which are produced by his care and toil but all fruits, because, in the matter of fruits, he is virtually in the position of an owner. Indeed, even before he gathers them, the fruits belong to the purchaser in good faith as soon as they are severed from the soil. And it is of no consequence whether what I purchase in good faith can be acquired by long prescription or not; as would be the case if it belongs to a *pupillus* or was taken by force or presented to the governor in breach of the *lex repetundarum* and alienated by the governor to a purchaser in good faith. 1. Conversely, the question is raised, assuming that when the thing is delivered to me, I believe it to belong to the vendor and subsequently discover that it belongs to another, can I make the fruits mine, seeing that the period of prescription continues to run? Pomponius says that it is to be feared that although he may usucapt, such a person is not a possessor in good faith; usucapion is a matter of law, while the question whether a person is a possessor in good faith or in bad faith is a matter of fact; and there is nothing perverse in the continuance of prescription since, on the other hand, a man who cannot usucapt by reason of a flaw in the thing yet makes the fruits of it his own. 2. The young of sheep count as fruits and so belong to the purchaser in good faith, even if the sheep were pregnant at the time of sale or had been stolen. And, certainly, there can be no doubt that he takes ownership of their milk, even though they were sold with full udders; the rule is the same for their wool.

49 PAUL, *Plautius, book 9:* When a fructuary makes a gift out of his own property [to the slave he holds in usufruct], that is an acquisition with his resources; but if he did it with the intention that it should belong to the slave's owner, it must be said that the latter acquires it. But if some third party makes a gift to the slave without specification, it will be acquired exclusively for his owner. We say the same of a freeman in servitude to me in good faith, that is to say, that if I give him anything, it is mine. Consequently, Pomponius writes that even if I make him a gift of his labor, anything that he acquires through that labor is, nonetheless, mine.

50 POMPONIUS, *From Plautius, book 6:* Although what we erect on the shore or in the sea becomes ours, a decree of the praetor, nevertheless, should be obtained, authorizing the erection; indeed more, one should be physically prevented, if he builds to the inconvenience of the public; for I have no doubt that he has no civil action in the matter.

51 CELSUS, *Digest, book 2:* We recover a deserter by right of war. 1. And property of the enemy, which is on our territory, becomes not public property, but that of the first taker.

52 MODESTINUS, *Rules, book 7:* We are deemed to have a thing among our assets whenever, being in possession of it, we have a defense or, on losing it, have an action to recover it.

53 POMPONIUS, *Quintus Mucius, book 14:* What is acquired by civil law methods, say on a stipulation, by those in our power is acquired by us; what is acquired naturally, possession, for instance, we acquire through anyone at all when we wish to possess.

54 POMPONIUS, *Quintus Mucius, book 31:* A freeman cannot acquire an inheritance for us. Such a one, in servitude to us in good faith, acquires the inheritance for himself, so long as he accepts it of his own will and knowing his true status; if, though, he accepts it at our behest, he acquires it neither for himself nor for us, if he has not the intent to acquire for himself; but if he has such intent, he acquires for himself. 1. A freeman, in servitude to us in good faith, by operation of law, can incur an obligation to us by promising in a stipulation as also by buying or selling or letting or hiring. 2. And by causing damage, he will be liable to us for damage wrongfully inflicted; but we should not require of him in the matter of causing damage the slight degree of fault that would suffice in the case of a stranger but rather gross negligence. 3. Now if, on our instruction, such persons conduct some transaction or act in our absence as our procurators, an action will be given against them. 3a. They will have the same liability, not only when we have bought them but also if they came to us as a gift or by way of dowry or legacy, and not only if we think them to be our own but also if we think that we are co-owners of them or have a usufruct in them, though, of course, they do not acquire for us what they would not have acquired if they, in fact, had been common or fructuary slaves. 4. Now whatever a freeman or someone else's slave in servitude to us in good faith does not acquire for us he acquires for himself, if free, for his real owner, if a slave. There is, however, the exceptional case that the freeman could scarcely usucapt the thing by possessing it, because a man cannot be regarded as in possession who is himself possessed by another. No more can the owner of a slave, who is in servitude to us in good faith, unknowingly usucapt through that slave on the ground of his *peculium*, just as he cannot do so through a runaway slave whom he does not possess.

55 PROCULUS, *Letters, book 2:* A wild boar fell into a trap which you had set for such purpose, and when he was caught in it, I released him and carried him off. Am I, then, to be seen as stealing your boar? And supposing him to be yours, would he cease to be or remain your property if, having released him, I set him free in a wood? Again, if he ceased to be yours, what action would you have against me? Should it be an *actio in factum*? These are my questions. The answer was this: Let us consider whether it be relevant that I set the trap on private land or on public land and, if on private land, whether it was my own or another's and, if another's, whether I set the trap with the owner's permission or without it; furthermore, let us consider whether the boar was so caught that he could not extricate himself or could do so only by lengthy struggling. Still I think that the cardinal rule is that if he has come into my power, the boar has become mine. And if you release my boar into his natural state of freedom and thereby he ceased to be mine, I should be given an *actio in factum*, as was the opinion given when someone threw another's cup from a ship.

56 PROCULUS, *Letters, book 8:* An island arose in a river, so facing the frontage of my land that its length did not extend beyond the frontage of my land; subsequently, the island gradually grew and extended opposite the frontage of both my superior and lower neighbors. My question is whether the accretion is mine, because it has been added to what is mine, or is it in the same position at law that it would have been if the island had been of its present length when it arose? Proculus replied: If that river in which, you write, an island arose, not exceeding the length of your frontage, is subject

to the right of alluvion and the island arose nearer your land than that of the owner on the other bank, the whole island is yours, and the subsequent accretion to it, by alluvion, is also yours, even though it be such as to extend the island beyond the frontages of your neighbors on either side or even to bring it nearer to the land of the owner on the other bank. 1. I have another question: The island having arisen nearer my bank, should the whole river subsequently begin to flow between me and the island, abandoning the former bed over which the main stream formerly flowed, do you in any way doubt that the island remains mine and equally that the soil which the river deserts also becomes mine? I ask you to write me your opinion. Proculus replied as follows: Assuming the island to have arisen nearer to your land in the first place, then, if the whole river, leaving its principal bed, which lay between the island and the land of your neighbor on the other bank, begins to flow between the island and your land, nonetheless, the island remains yours. But the bed previously existing between the island and your neighbor's land should be divided down the middle, so that the part nearer to your island should be deemed to be yours and the part nearer to your neighbor his. I naturally take the point that when the river bed on the other side of the island has dried up, it ceases to be an island, but to make the issue more readily intelligible, the land which was an island is still styled an island.

57 PAUL, *Plautius, book 6:* Julian writes that no acquisition is made for the donee through a slave given by her husband, even in respect of the donee's property; this has been allowed only in the case of persons in servitude in good faith.

58 JAVOLENUS, *From Cassius, book 11:* Nothing salvaged from the sea becomes the property of the salvor until its owner has begun to treat it as abandoned.

59 CALLISTRATUS, *Questions, book 2:* A thing purchased on my mandate does not become mine until delivered to me by the actual purchaser.

60 SCAEVOLA, *Replies, book 1:* Titius erected his new mobile barn, made of wooden planks, on Seius's land. The question is: Which of the two is owner of the barn? The reply was that on the facts as stated, it has not become the property of Seius.

61 HERMOGENIAN, *Epitome of Law, book 6:* In many fields of law, an inheritance is treated as though it were an owner; and so an acquisition too may be made for the inheritance, as for an owner, through a slave of the inheritance. Naturally, however, where the act of a person, or some genuine activity, is necessary, nothing can be acquired for the inheritance through a slave. Consequently, although a slave of an inheritance can be instituted heir to another, since there is yet lacking the personality of a master to authorize him to accept, the heir of the inheritance must be awaited. 1. A usufruct, which cannot exist without a person, cannot be acquired for an inheritance by a slave.

62 PAUL, *Handbook, book 2:* Those things which cannot be alienated individually may pass as part of the estate to the heir, for example, dotal land and things which cannot be the object of acquisition by a given person; although these last could not be bequeathed as legacies to him, nevertheless, as the instituted heir, he becomes their owner.

63 TRYPHONINUS, *Disputations, book 7:* When someone in another's power finds treasure, this must be said in relation to the person for whom he acquires it, that if he finds it on a third person's land, he acquires part for that person, but if he finds it on the land of his head of household, the whole belongs to the head of household, but if it be found on another's land, only part. 1. If a slave owned in common finds treasure on a third person's land, does he acquire for his masters in proportion to the share that each has in him or for all of them equally? The case is similar to that of an inheritance or legacy or a gift to the slave by third parties; for treasure too is regarded as the gift of fortune, so that the part of it which falls to the finder belongs to the slave's co-owners in proportion to their respective shares in the slave. 2. Should a slave owned in common find treasure on the private land of one of his owners, there is no doubt that so far as concerns the share which always falls to the landowner, it belongs exclusively to the

owner of the land; but we have to consider whether his co-owner gets a share in the other half and whether the case is not similar to that where the slave stipulates at the direction of one master alone or takes delivery of something or does so specifically for one; this is the more probable view. 3. But if a slave, in whom someone has a usufruct, finds treasure on the land of his real owner, does it all go to that owner; and if he finds on someone else's land, does he acquire the finder's share for his owner or for the fructuary? The question to be considered is whether it is acquired by the slave's labors. Suppose that he found it while digging the land; it might be said to be the fructuary's; but what he comes across by chance in a secluded spot, while simply rambling aimlessly, would go to his owner. Myself, I think that, not even in the former case, does the half go to the fructuary. For no one looks for treasure through the offices of a slave, and the slave was not digging for that purpose; but he was laboring on one thing, and fortune gave him the other. Hence, even if he found it on the fructuary's own land, I think that the latter would get only the half that goes to the landowner, the other half going to the slave's owner. 4. If a creditor should find treasure [on land pledged to him], he is held to find it on someone else's land, and he allocates half for himself and half to the debtor; and when the debt has been paid, he will not have to yield up that half of the treasure which was his as finder and not as creditor. Things being so, even when a creditor begins, by imperial decree, to hold for himself as owner, the case is still one of pledge, while the time for redemption is still running; but once that period has expired without payment having been made, he will keep the whole of the treasure. But if the debt be tendered within the appointed period, since all must be made good which must be given back in the case of an ordinary creditor, the treasure too must be restored, but only half of it because it is settled that the finder always retains half.

64 QUINTUS MUCIUS SCAEVOLA, *Definitions, sole book:* Someone else's property, which a person enters as his own in the census, does not thereby become his.

65 LABEO, *Plausible Views, Epitomized by Paul, book 6:* If I send you a letter, it will not be yours until it has been delivered to you. PAUL: Quite the contrary; for if you send your letter-carrier to me and I send you a letter in reply, it will become yours as soon as I hand it to the carrier. The same is true of any letter which I send you exclusively for your own purposes, say, if you have asked me to give you a testimonial and I send you the testimonial. 1. If some island in a river is your property, there is no public right. PAUL: No; with islands of this kind, the river banks and seashore are public, no differently from that which applies to the mainland. 2. If an island should arise in a public river nearer to your land, it is yours. PAUL: Let us consider whether this is not wrong in respect of an island which does not cohere to the actual riverbed, but which is held in the river by brushwood or some other light material in such a way that it does not touch the riverbed and can itself be moved; such an island would be virtually public and part of the river itself. 3. PAUL: If an island arising in a river is yours and then another island arises between it and the opposite bank, measurements should be taken in respect of it from your island and not from your riparian holding; for what is the relevance of the character of the land on account of proximity to which the issue of ownership of the second island arises? 4. LABEO, *same book.* If that which arises naturally or is built in a public place is public, an island arising in a public river ought to be public too.

66 VENULEIUS, *Interdicts, book 6:* If a pregnant woman be bequeathed or usucapted or alienated in some other manner and then gives birth, her issue will belong to her owner at the time of the birth, not to him who then owned her when she conceived.

2

ACQUISITION AND LOSS OF POSSESSION

1 PAUL, *Edict, book 54:* Possession is so styled, as Labeo says, from "seat," as it were "position," because there is a natural holding, which the Greeks call κατοχή by the person who stands on a thing. 1. The younger Nerva says that the ownership of things originated in natural possession and that a relic thereof survives in the attitude to those things which are taken on land, sea, or in the air; for such things forthwith become the property of those who first take possession of them. In like manner, things captured in war, islands arising in the sea, and gems, stones, and pearls found on the seashore become the property of him who first takes possession of them. 2. Now we can acquire possession in person. 3. A madman, however, and a *pupillus* acting without his tutor's authority cannot begin to possess because they have not the intention to hold, whatever their physical contact with the thing, as when one places something in the hand of a sleeping man. A *pupillus*, though, who acts with his tutor's authority does take possession. Ofilius, indeed, and the younger Nerva say that a *pupillus* can commence possession even without his tutor's authority, since the issue is one of fact, not of law; this view may be accepted if the young people be of such an age that they have understanding. 4. Should a husband yield up possession to his wife by way of gift, the general view is that she is now in possession, since an issue of fact cannot be invalidated by the civil law; and what point would there be in saying that the wife is not in possession in view of the fact that the husband lost possession as soon as he decided no longer to possess? 5. Similarly, we acquire possession through a slave or son in our power and, indeed, in the case of those things which they hold in *peculium*, we do so, even without being aware of the fact; this was the view of Sabinus, Cassius, and Julian, since those are deemed to possess with our consent whom we have allowed to have a *peculium*. In consequence, in relation to the *peculium*, even an infant or lunatic acquires possession and may usucapt, so also the heir, if a slave, part of the inheritance, buys something. 6. Furthermore, we acquire possession through someone whom we possess in good faith, whether he be in fact a freeman or the slave of another. But if we possess him in bad faith, I do not think that we can acquire possession through him; at the same time, one in the possession of another cannot acquire possession either for his true owner or for himself. 7. We acquire possession also through a slave owned in common as we would through one owned exclusively, any given owner acquiring possession alone, if the slave have in mind to acquire only for him, as would be the case also for the acquisition of ownership. 8. We can also possess through a slave whom we have in usufruct, just as we acquire through his labor; and it is not to the point that we do not possess him; for neither do we possess a son-in-power. 9. However, the person through whom we seek to possess must be such as to have an understanding of possession. 10. Hence, if you send a lunatic slave so that you may take possession, you are in no way regarded as having taken possession. 11. If, though, you send an *impubes*, you commence possession, just as a

pupillus, certainly when he has his tutor's authority, acquires possession. 12. Then there is no doubt that you can take possession through a female slave. 13. A *pupillus* acquires possession through a slave, whether above or below the age of puberty, if he directs that slave, with his tutor's authority, to enter into possession. 14. The younger Nerva says that we can possess nothing through a runaway slave, despite the fact that, so long as he is in no one else's possession, he is possessed by us and so can even be usucapted. But reasons of convenience established the rule that his usucapion may be completed so long as no one else has taken possession of him. On the other hand, it is the view of Cassius and Julian that we can acquire possession through the runaway, just as we would through slaves whom we have in a province. 15. Julian says that we do not acquire possession through a slave physically delivered up by way of pledge (for he is deemed to be possessed by the debtor for one purpose only, that of usucapion); but he does not acquire possession for the creditor either, because the creditor, even though in possession of him, does not acquire through him, whether on a stipulation or on any other ground. 16. The earlier jurists took the view that we cannot acquire through a slave, part of the inheritance, anything else from the same inheritance. Accordingly, there has been discussion whether this rule is to be taken further so that if several slaves be bequeathed, the issue is whether the others can be possessed through one of them by the legatee. The same problem arises if they are bought or donated together. The truer view, however, is that I can, through one, possess the rest. 17. If a slave be bequeathed to someone instituted as part heir, that heir acquires possession of land, part of the inheritance, through the slave, by virtue of the share that he has in him through the legacy. 18. The same must be said if I direct a slave, whom I own in common, to accept an inheritance; for I acquire it by reason of my share in him. 19. What we have said about slaves holds good, provided that they themselves wish to acquire possession for us; for if you bid your slave to take possession and he does so with the intent to possess not for you, but rather for Titius, you do not acquire possession. 20. We acquire possession through a procurator, tutor, or curator. But should they take possession in their own name and not merely by way of making available their services, we cannot make an acquisition through them. Otherwise, if we say that we cannot acquire possession through someone who takes in our name, the position would be that neither he to whom the thing is delivered will have possession, because he does not intend to possess, nor he who makes delivery, because he has ceased to possess. 21. If I bid the vendor to deliver a thing to my procurator, the thing being then present, Priscus says that it is to be held to have been delivered to me and that the same is true if I direct my debtor to give the money to a third party. For he says that there is no need for actual physical contact in order that possession may be taken; but that it can be done by sight and intent is demonstrated in the case of those things which, because of their great weight, cannot be moved, columns, for instance; for they are regarded as delivered, if the parties agree on their transfer in the presence of the thing; so also wines are deemed delivered when the keys of the cellar are delivered to the purchaser. 22. Citizens of a municipality can possess nothing of themselves, because the consent of all is not possible. Hence, they do not possess the marketplace, public buildings, and the like, but they use them in common. The younger Nerva, however, says that they can both possess and usucapt through a slave what he has acquired through his *peculium*; there are, though, those who think differently, since the citizens do not own the slaves themselves.

2 ULPIAN, *Edict, book 70:* The rule that we observe, however, is that citizens of a municipality can both possess and usucapt and thus that they can acquire through a slave and through a freeman.

3 PAUL, *Edict, book 54:* Those things can be possessed which are corporeal. 1. Now we take possession physically and mentally, not mentally alone or physically alone. But when we say that we must take possession both physically and mentally, that should not be taken to mean that one seeking to possess an estate must go round every part of it; suffice it that he enters some part of the estate, but with the intent and awareness that thereby he seeks to possess the estate to its utmost boundaries. 2. No one can possess an indeterminate part of a thing, as in the case that you are of a mind also to possess whatever Titius possesses. 3. Neratius and Proculus say that there can be no acquisition of possession by intent alone, unless there be a previous physical holding of the thing. Thus, if I know that there is treasure buried in my land, I possess it as soon as I form the intention to possess it, because what is lacking in actual holding is made up by my intention. On the other hand, the opinion of Brutus and Manilius that one who acquired ownership of land by long possession thereby also acquired treasure buried in it, although unaware of its existence, is not correct. Indeed, if he does know, he does not acquire it by long possession since he knows it to be the property of someone else. There are those who hold to be more correct the view of Sabinus, namely, that one aware of the existence of the treasure begins to possess it only when it is removed from the soil because, until then, it is not in his keeping; with these jurists, I am in agreement. 4. We can possess the same actual thing on a variety of grounds; hence, there are those who think that a man completing usucapion may have done so both as a purchaser and in his own name; suppose that I become heir to one in possession, as a purchaser, I possess that same thing both as purchaser and as heir; for unlike ownership which can be based on only one ground, possession may be held under a variety of heads. 5. By contrast, several persons cannot possess the same thing exclusively; for it is contrary to nature that when I hold a thing, you should be regarded as also possessing it. Sabinus, it is true, writes that one who grants a thing by *precarium* himself possesses it, as also does the grantee. Trebatius takes the same view and thinks that there can be simultaneously a just and an unjust possessor but not two just or two unjust possessors. Labeo takes him to task on the ground that, on the issue of possession, it is irrelevant whether a person is in lawful or in unlawful possession; and that is the more correct view. For it is no more possible that the same possession should be in two persons than that you should be held to stand on the same spot on which I stand or to sit in the place where I sit. 6. Again, for the loss

of possession, the possessor's mental attitude must be considered; if you are on a piece of land and lose the will to possess it, you immediately cease to possess it. Hence, possession can be lost, though it cannot be acquired, by will alone. 7. But should you be in possession by will alone, you continue to possess the land, even though someone else be physically present on it. 8. If someone should inform the owner that his house has been occupied by brigands and, in terror, the owner does not return there, he has certainly lost possession of the house. But if the slave or tenant, through whom I was physically in possession, should die or go away, I retain possession solely by intent. 9. If I deliver a thing to someone else, I lose possession of it. For it is settled that we remain in possession until either we voluntarily abandon it or we are ejected by force. 10. If a slave of whom I was in possession should, as did Spartacus, comport himself as though he was a freeman and be prepared to go through with litigation over his free status, he cannot be regarded as possessed by the master to whom he is ready to be an opponent in the courts. This, however, is true if he has been some time in a state of liberty; if, on the other hand, while possessed as a slave, he maintains that he is free and seeks a trial of the issue, he remains, notwithstanding, in my possession, and I possess him by will until he shall have been declared a freeman. 11. We possess by will summer and winter pastures, even though we desert them at given periods. 12. But we possess by our own intent, although through the corporeal act of another, as we have said of the slave and the tenant, and it should cause us no concern that even unknowingly, we possess certain things, namely those which a slave acquires by virtue of his *peculium*. For such things we are held to possess both physically and by intent. 13. The younger Nerva says that, leaving aside a slave, movable things are possessed by us only so long as they are in our keeping, that is, so long as we can, if we so choose, take physical control of them. For once an animal strays or a vase falls, so that it cannot be found, it immediately ceases to be in our possession, even though it is possessed by no one else; this differs from the case of something which is still in our keeping, though not immediately traceable; because the fact remains that it is still there, and all that is necessary is a diligent search for it. 14. Then again, we possess those wild animals which we have penned up or the fish which we have placed in tanks. But those fish which live in a lake or beasts which roam in an enclosed wood are not in our possession, because they are left in their natural state of liberty. Any other view would mean that the purchaser of a wood thereby should be held to possess all the animals in it; and that is not true. 15. We possess also birds which we keep in cages or which, being domesticated, are under our control. 16. It is, further and correctly, the view of some that we possess doves which fly from our cotes, as also bees which fly from our hives, they having the habit of returning. 17. Labeo and the younger Nerva ruled that I cease to possess land which is inundated permanently by a river or by the sea. 18. If you meddle with a thing which I have deposited with you, with a view to stealing it, I cease to possess it. But if you do not

move it from its position, though having the intention to deny the deposit, the majority of the older jurists, as also Sabinus and Cassius, rightly ruled that I remain possessor of it because there can be no theft without physical meddling; and we do not accept the idea of theft simply by intent. 19. The earlier jurists further laid down that no one can for himself change the title by which he possesses something. 20. But if someone who has deposited something with me or lent it to me, then sells or donates the thing to me, I am not regarded as changing the ground of my possession because, previously, I did not even possess the thing. 21. There are as many kinds of possession as there are grounds for acquiring what does not belong to us, for example, possession as purchaser, on gift, legacy, dowry, inheritance, noxal surrender, as one's own, as in the case of those things which we catch on land or sea or which we seize from the enemy or which we ourselves have created. All in all, possession as such is one in nature, but its varieties are infinite. 22. Or, again, possession as such can be divided into two categories, according as it is held in good faith or in bad faith. 23. It was, though, very stupid of Quintus Mucius to include among the instances of possession those cases in which we possess something by magisterial order in order to preserve it, because the magistrate who sends a creditor into possession to preserve the thing, or because an undertaking has not been given in respect of threatened damage or in the interests of an unborn child, does not grant possession proper but only the guarding and custody of the thing. Hence, when we are granted possession because our neighbor will not give an undertaking against threatened damage, if this continues for some time, then the praetor, after investigating the matter, allows us to have possession proper and to acquire ownership by long possession.

4 ULPIAN, *Edict, book 67:* Whatever a son takes by right of *peculium*, his head of household possesses forthwith, even though unaware that the son is in his power. Moreover, this holds good, even if the son is possessed by someone else as a slave.

5 PAUL, *Edict, book 63:* If I owe you Stichus on a stipulation and do not deliver him but you obtain possession of him, you are a robber; equally, if I sell a thing and do not deliver it, but you obtain possession of it without my consent, you do not possess it as purchaser but are again a robber.

6 ULPIAN, *Edict, book 70:* We say that a person possesses by stealth who has entered furtively into possession without the knowledge of him who, he suspects, would oppose his taking, and he is fearful that this would happen. On the other hand, a person, not in clandestine possession, who has concealed himself is not in such case that he should be held to possess by stealth; for the factor to be considered is not the manner of holding possession but its original acquisition; and no one acquires possession by stealth who takes possession with the knowledge or consent of the thing's owner or on any other ground of good faith. Pomponius accordingly says that a person acquires

possession by stealth who enters furtively into possession, fearing opposition and without the knowledge of the man of whom he is apprehensive. 1. Suppose a man to go to market without leaving someone in charge and, while he is returning from market, someone seizes possession; Labeo says that this person possesses by stealth, and so the man who went to market remains in possession; but if the trespasser does not admit the owner on his return, he is regarded as possessing by force rather than by stealth.

7 PAUL, *Edict, book 54:* But if the owner declines to return to his land because he fears superior force, he will be deemed to have lost possession. Neratius writes the same.

8 PAUL, *Edict, book 65:* Just as no possession can be acquired except physically and with intent, so none is lost unless both elements are departed from.

9 GAIUS, *Provincial Edict, book 25:* In general, we are held to possess a thing, whoever be holding in our name, say, a procurator, a guest or a friend.

10 ULPIAN, *Edict, book 69:* Suppose a man first to have hired and then to have obtained a *precarium* of something; he is deemed to have resiled from the hiring. But if he first obtained the *precarium* and then hired, he will be held to be a hirer. For it is what is done last which is held operative; and so says Pomponius. 1. The same Pomponius most admirably treats of the case of one who, having rented land, then gets a *precarium* of it, the object of the *precarium* being not that he should have possession, but that he should be in possession of it (for there is no small difference; it is one thing to possess a thing and quite another to be in possession of it; persons holding a thing for its preservation or on account of legacies or by reason of threatened damage do not possess it, but are in possession of it to keep it safe); in such a case, he holds both as hirer and as grantee at will. 2. If someone hires a thing and obtains a *precarium* to possess it, then, if the hiring be for a single coin, there is no doubt that only the *precarium* is effective; for a hiring for a single coin is a nullity; but if the hiring were for a genuine rent, we must distinguish according to which transaction came first.

11 PAUL, *Edict, book 65:* A man possesses lawfully who possesses by the praetor's authority.

12 ULPIAN, *Edict, book 70:* A person who has a usufruct is regarded as possessing only in fact. 1. Ownership has nothing in common with possession; hence, a man who institutes a *vindicatio* for land will not be refused the interdict *uti possidetis*; for he is not deemed to have renounced possession by asserting ownership.

13 ULPIAN, *Edict, book 72:* Pomponius discusses the question whether, when stones

had been sunk in the Tiber in a shipwreck and some time later salvaged, the ownership of them remained intact throughout the time that they were submerged. My view is that I remain owner of them but I do not possess them; the case is not like that of a runaway slave; for the slave is held to be still possessed simply so that he shall not, by his own act, deprive his master of possession; the stones are a different matter. 1. When we invoke some support derived from our predecessor in title, we must accept it with all its incidents and defects; thus, when we count for ourselves the period of holding of our predecessor, there is the possibility that he possessed by force, stealth or *precarium*. 2. Another question is this: Suppose that a purchaser returns a slave to his vendor; can the vendor count for himself the period that the purchaser possessed him? There are those who think that he cannot, since the return puts an end to the sale; others hold that the vendor can add the period of holding of the purchaser and the purchaser that of the vendor; and this I think the view to be endorsed. 3. If, when in servitude in good faith, a freeman, or a third person's slave, buys and acquires possession of something for his seeming owner, neither the freeman nor the slave's owner can avail himself of that person's period of possession. 4. The question has been put whether, if an heir has not possessed, his testator's period of possession runs for him. In respect of purchasers, in such a case, possession is interrupted; now the majority of jurists do not take the same view of heirs, because the right of succession is more comprehensive than that of purchase; but it is more fitting to approve the same rule for an heir as for a purchaser. 5. The heir takes the benefit of not only the possession which his testator had at death but also of any that he ever had. 6. Similarly, if a thing be given in or returned from a dowry, the addition of periods of holding will be granted, as appropriate, to the husband or to the wife. 7. If a grantor of a *precarium* wishes to include the period of possession of his grantee, the question is whether he can do so. I am of opinion that so long as such a grant lasts, the grantor cannot do so; but should he resume possession, breaking the *precarium*, it must be said that he can avail himself of the period of possession under the *precarium*. 8. In a specific case, the question is raised whether, if a manumitted slave holds a thing, part of his *peculium*, which has not been granted to him, the master, having revoked his possession, can validly count that period of possession for himself. The view adopted was that such possession, acquired by stealth, cannot be included. 9. If, by judicial order, there be restored to me something held by a robber, I must, it is accepted, be allowed to count for myself his period of holding. 10. It should also be known that a legatee can call in aid the period for which his testator possessed the thing. Whether he can also avail himself of the heir's possession of it is a matter for consideration. My own view is that, whether the legacy be absolute or conditional, the legatee profits by the heir's period of possession, whether that be before the condition is satisfied or before the actual delivery of the thing. The testator's possession always redounds to the legatee's advantage, whether there be in truth a legacy or a *fideicommissum*. 11. A donee may claim for his own benefit the period of possession of his donor. 12. Such additions of possession are relevant, however, in respect of those who themselves possess things; they are of no advantage to one who does not himself

possess. 13. Furthermore, no possession can be added to one which is flawed; and equally, a flawed possession cannot be added to an unflawed possession.

14 PAUL, *Edict, book 68:* If my slave or son-in-power should sell something, the purchaser can utilize the time that the thing was in my control, naturally on the assumption that the sale was made with my consent or that the object came from a *peculium* of which I had granted free administration. 1. Equally, when a tutor or curator sells, there is an addition of the period of possession of the *pupillus* or the lunatic.

15 GAIUS, *Provincial Edict, book 26:* We are deemed to lose possession of a thing appropriated from us in the same way that we lose what is taken by force. But should it be someone in our power who makes such appropriation, we do not lose possession, so long as it is in his charge; for it is through such persons that we acquire possession. This is the reason that we are held to possess a runaway slave because, just as he cannot intercept possession of other things, so he cannot intercept possession of himself.

16 ULPIAN, *Edict, book 73:* What a wife gives as a present to her husband or a husband to his wife is possessed simply as possessor.

17 ULPIAN, *Edict, book 76:* If a person be evicted forcibly from possession, he is treated as still possessing, since he has the ability to recover possession by the interdict *de vi.* 1. There is this difference between ownership and possession: that a man remains owner even when he does not wish to be, but possession departs once one decides not to possess. Hence, if someone should transfer possession with the intention that it should later be restored to him, he ceases to possess.

18 CELSUS, *Digest, book 23:* What I possess in my own name I can possess in that of another; and I do not thereby change the ground of my possession, but rather do I cease to possess and make the other person possessor through my agency. For it is one thing to possess and another to possess on someone else's behalf; he is the possessor in whose name a thing is possessed; the procurator simply provides the agency of another's possession. 1. Suppose that you deliver a thing to a lunatic, whom you think to be of sound mind, perhaps because he had the aspect of appearing undisturbed; you cease to possess although he does not acquire possession; for it is sufficient to give up possession, even though you do not transfer it. For it is ridiculous to say that a man intends to give up possession only if he transfers it; rather does he give up possession because he intends to transfer it. 2. If I instruct the vendor to leave at my house what I have bought, it is certainly the case that I possess it, even though no one has yet touched it; again, if my vendor points out to me from my turret the neighboring land which I have bought and declares himself to be giving me vacant possession, I begin to possess it no less than if I set foot within its boundary. 3. If, while I am in

one part of my estate, someone else enters by stealth, intending to possess the estate, I am not to be held at once to lose possession, since I can easily eject him as soon as I am aware of his presence. 4. Likewise, if an army has entered with great force, it holds only that part which it has occupied.

19 MARCELLUS, *Digest, book 17:* A man who, in good faith, bought someone else's land, hired it from the owner. I ask whether or not he ceases to possess it. My reply was that he clearly ceases to possess. 1. When the earlier jurists write that no one can change the ground of his own possession, this may be thought tenable of one who, being already physically and with intent in possession, merely decides to possess by some other title; it does not apply to one who, giving up his previous possession, intends to obtain a new possession by a different title.

20 MARCELLUS, *Digest, book 19:* If a person lends a thing for use and then sells it and directs the borrower to deliver the thing to the purchaser and he does not do so, the borrower, in some cases, will be held to have appropriated to himself the vendor's possession, in other cases, not. For the vendor does not always lose possession at the time when the thing lent for use is not returned to him on demand; what, for instance, if the borrower has some other lawful and reasonable ground for not returning it without any intention of usurping possession of it?

21 JAVOLENUS, *From Cassius, book 7:* Sometimes a man can confer on another possession of a thing which he does not himself possess; this happens, for instance, when, before he has thereby acquired ownership, a person possessing as heir obtains a *precarium* of it from the actual heir. 1. What has been cast up from a shipwreck cannot be the object of usucapion, because it has been not abandoned but lost. 2. I think that the same rule holds good for jetsam; for what is temporarily cast away in the interests of safety cannot be held to have been abandoned. 3. Should one who has obtained a *precarium* of a thing then hire it from the owner, possession of the thing returns to the owner.

22 JAVOLENUS, *From Cassius, book 13:* A man is not regarded as having possession who so acquired it that he cannot retain it.

23 JAVOLENUS, *Letters, book 1:* When we are instituted heirs, once we accept the inheritance, all the rights pertaining thereto belong to us; but possession does not become ours unless we physically take it. 1. A particular provision exists for those who fall into enemy hands in respect of their retention of rights in their assets; they do indeed lose physical possession; for no one can be held to possess who is himself possessed by others; it follows, therefore, that on their return, they must take up a new possession, even though no one, during their absence, possessed their goods. 2. I have another question: Suppose that I fetter a freeman in such a way that I possess him; do I thereby possess through him all that he possesses? The reply was: If you bind a freeman, I do not think that you do possess him; such being the case, still less do you possess through him his own possessions; and, in the nature of things, it cannot be accepted that we can possess something through one whom we do not have in our power at civil law.

24 JAVOLENUS, *Letters, book 14:* You do not possess what, without your knowledge,

your slave possesses by force, because one in your power, without your knowledge, can acquire for you only lawful possession, not that which exists only in fact; thus, he possesses what comes to him through his *peculium*. A master is said to possess, in such circumstances, through his slave and, indeed, with every justification, because what the slave physically holds, by lawful title, is in the slave's *peculium* and the *peculium*, which the slave, of course, cannot possess at civil law, but can hold only in fact, his owner is held to possess. But what comes his way through wrongdoing does not become a possession of his owner, because he does not obtain it by reason of the *peculium*.

25 POMPONIUS, *Quintus Mucius, book 23:* If we possess something and lose it in such circumstances that we do not know where it is, we lose possession of it. 1. We possess also through our tenants, agricultural or urban, and through our slaves; and should they die or lose their reason or let to someone else, we are deemed to retain possession. No difference exists between the agricultural tenant and the slave through whom we retain possession. 2. But in respect of what we possess solely by intent, the question arises whether we possess it only until another enters upon the thing, so that his physical possession is the stronger, or rather (and this appears the preferred view) we possess until someone excludes us on our return or until we cease to have the possessory intent because we suspect that we may be excluded by the intruder; this latter seems the more practical view.

26 POMPONIUS, *Quintus Mucius, book 26:* A specified portion of an estate can be possessed and thereby taken into ownership by long possession as can also a specific undivided share, whether it derive from a sale, a gift, or any other source. But a nonspecific part can be neither transferred nor usucapted, as when I transfer to you "whatever right I have in the land"; for one unaware of the facts can neither deliver nor accept what is unparticularized.

27 PROCULUS, *Letters, book 5:* If a person retaining possession of pastures by intention loses his senses, he cannot, during his period of unreason, lose possession of the pasture because a lunatic cannot lose possession by intention.

28 TERTULLIAN, *Questions, book 1:* Suppose that I possess something and subsequently hire it; do I lose possession of it? In such matters, it is of great importance what the parties intended; in the first place, do I, or do I not, know that I possess the thing; then, do I hire the thing as being, or not being, mine; and, if I know it to be mine, do I hire in respect of its ownership or only its possession? For even if you possess my thing and I buy from, or stipulate from you for, the possession of it, the purchase or stipulation will be valid. It follows that equally a *precarium* or a hiring will be valid, if the intention be directed specifically to hiring the possession or obtaining it by *precarium*.

29 ULPIAN, *Sabinus, book 30:* It is established law that a *pupillus* cannot lose possession without his tutor's *auctoritas*; this meaning that though he loses possession physically, he cannot do so by intent; for he can lose what is a matter of fact. The case,

though, is different if perchance he wishes to abandon possession by intention; this he cannot do.

30 PAUL, *Sabinus, book 15:* A person possessing a building as a whole is not deemed to possess the individual things in the building. The same applies to a ship and to a cupboard. 1. There is a variety of ways in which we lose possession; we may, for instance, inter a corpse in land which we possess; for we cannot possess a religious or sacred place, even though we personally spurn religion and regard the land as private; the same is true of a freeman. 2. In similar manner, if the praetor should order entry into possession of something, because security has not been given in respect of it against threatened damage, Labeo says that the owner, against his will, loses possession of it. 3. Likewise, we cease to possess what is occupied by the sea or a river or if the person in possession should pass into the power of another. 4. Then, again, a movable thing we may cease to possess in a variety of ways; it could be that we do not wish to possess it or that we manumit a slave, for instance, or that what we possess is converted into a new form, as when a garment is woven out of wool. 5. What I possess through my tenant my heir cannot possess, unless he personally takes possession of it; for though we can retain possession by intention, we cannot so acquire it. Still what I possess as purchaser, albeit through a tenant, my heir will also be able to usucapt. 6. If I lend you something for use and you lend it to Titius who thinks it to be yours, I possess it, nonetheless. The same holds good if my tenant lets the land or if my depositee redeposits the thing with someone else. This rule must apply, if such process continue through several other persons.

31 POMPONIUS, *Sabinus, book 32:* If a tenant farmer should quit the land without the intention to abandon possession of it and then return there, the landlord is held to continue to possess.

32 PAUL, *Sabinus, book 15:* Although a *pupillus* does not come under an obligation without his tutor's *auctoritas*, nevertheless, we can retain possession through him. 1. Suppose that the hirer of a thing sells it and then hires it from the purchaser and pays rent to each of his lessors; the earlier lessor is most correctly held to retain possession through the hirer. 2. An infant can legally possess if he takes possession with his tutor's *auctoritas*, because the tutor's *auctoritas* supplements the infant's judgment; this has been accepted on grounds of expediency, since there would otherwise be no sense in the infant's accepting possession. A *pupillus*, on the other hand, can take possession even without his tutor's *auctoritas*. Again, an infant can possess through a slave in respect of the latter's *peculium*.

33 POMPONIUS, *Sabinus, book 32:* Even though the vendor of land may have charged someone to give the purchaser vacant possession of it, the purchaser will not lawfully come into possession until that happens. Likewise, if, on the vendor's death, his friend, whether in ignorance of the death or with the consent of the heirs, discharges his commission, possession will have been lawfully delivered. The converse will be true, however, if he so act, knowing the owner to be dead or that the heirs do not wish it.

34 ULPIAN, *Disputations, book 7:* If you send me into vacant possession of the Cornelian estate and I think that you are sending me into the Sempronian but I enter upon

the Cornelian, I do not acquire possession of it, unless it chance that we are agreed on the estate and in error only over its name. But even when we are not agreed on the object, it can be a matter of doubt whether possession still does not depart from you, since both Celsus and Marcellus write that we can both shed and change possession by simple intent; and if possession can be acquired simply by intent, should it not be acquired in the present instance? Personally, however, I do not think that one in error can take possession; it follows that a person does not lose possession who withdraws, as it were under a condition, from possession. 1. But if you deliver possession not to me, but to my procurator, it is a matter for consideration whether possession be acquired for me, supposing me to be in error but my procurator not. Since it has been accepted that acquisition is possible for one in ignorance, so is it also for one in error. Conversely, if my procurator should be in error but not I, the better view is that I acquire possession. 2. Again, my slave acquires possession for me, even though I be unaware thereof. For, as Celsus writes, even someone else's slave, whether possessed by me or by no one, can acquire possession for me, if he takes it in my name. This also must be conceded.

35 ULPIAN, *All Seats of Judgment, book 5:* The outcome of a dispute over possession is simply this: that the judge makes an interim finding that one of the parties possesses; the result will be that the party defeated on the issue of possession will take on the role of plaintiff when the question of ownership is contested.

36 JULIAN, *Digest, book 13:* A person making over land to his creditor by way of pledge is deemed to possess it. Now if he should seek a *precarium* of it, nevertheless, he can acquire it by long possession; for the creditor's possession not preventing such acquisition, still less should holding by *precarium* be an obstacle; for one possessing by *precarium* has a better possessory title than one who does not possess at all.

37 MARCIAN, *Action on a Mortgage, sole book:* When a thing is given in pledge and possession of it is transferred and then it is hired by the debtor from the creditor, it is agreed that the person making the hypothec is held to be a tenant in respect of both land and houses; the creditor is deemed to possess through such persons.

38 JULIAN, *Digest, book 44:* One who writes to his absent slave that he is to be in a factual state of liberty does not have the intention to yield up forthwith possession of the slave but rather to defer his decision until the slave is apprised of the facts. 1. If someone so convey possession of land that he declares himself only to transfer it, if the land be his, possession is not held to be delivered, if the land belongs to another person. Developing this, it must be accepted that possession can be delivered conditionally in the same way that ownership can be transferred in such wise that it

becomes the recipient's only if the condition be realized. 2. Should someone who sold a slave to Titius deliver the slave to Titius's heir, the heir, through the slave, will be able to take possession of assets of the inheritance, because it is not the slave, but the action on purchase in respect of the slave that comes to him by hereditary title; for even if a slave was due to the testator under a stipulation or a will and the heir accepted him, he would not be precluded from acquiring, through such slave, possession of things, part of the inheritance.

39 JULIAN, *From Minicius, book 2:* I think it a matter of importance with what intention a thing is deposited with a sequestrator. For if it was done to break a possession and this has been clearly demonstrated, his possession will not avail the parties for the purpose of usucapion; but if the deposit is for safekeeping, his possession will certainly avail the party successful in the dispute for usucapion.

40 AFRICANUS, *Questions, book 7:* [Julian] says that if your slave should evict you from the land which I gave you in pledge when I possessed it, you still possess it because you continue to possess through the very slave himself. 1. If the tenant farmer, through whom the landowner possesses, should die, it has been accepted on grounds of convenience that possession is retained and continued through the tenant, and on his death, it is not to be said that possession is broken forthwith but only when the owner fails to take possession. A different view is to be taken, he says, if the tenant goes out of possession of his own accord. All this, however, is true, only if no stranger has taken possession meanwhile but the land has remained throughout in the tenant's inheritance. 2. I bought your slave in good faith from Titius and took possession of him on delivery; then, when I discovered that he belonged to you, I began to conceal him, lest you should claim him from me. [Julian] says that I am not to be held, on that account, to possess him by stealth during that period; for conversely, if I knowingly buy your slave from a nonowner and, having commenced possession of him by stealth, I subsequently inform you, I do not thereby cease to be in clandestine possession of him. 3. His answer was that if I take my slave away by stealth from his purchaser in good faith, I am not to be regarded as in clandestine possession, because an owner is not bound by a *precarium* or a hiring of his own thing; and the case of clandestine possession cannot be separated from those two grounds.

41 PAUL, *Institutes, book 1:* One who enters a friend's land by right of their friendship is not held to possess it because, although he is physically on the land, he does not enter with the intent to possess it.

42 ULPIAN, *Rules, book 4:* Although a slave owned in common may be possessed by one of his owners in the name of all, he is treated as possessed by them all. 1. If, on his principal's mandate, a procurator buys something, he acquires possession of it for him forthwith; but if he buys it on his own initiative, only if his principal ratifies the purchase.

43 MARCIAN, *Rules, book 3:* Suppose a man to buy land, a small part of which he knows to belong to another. Julian says that if he knows that that other's share is defined, he

can obtain ownership of the remaining parts by long possession; but if it is an undivided share, although he does not know its location, he can equally acquire because the share believed to belong to the vendor passes, without harm to anyone, to the purchaser by long possession. 1. Again, Pomponius, in the fifth book of his *Miscellaneous Readings*, writes that if a purchaser in good faith knows or thinks that someone else has a usufruct in the thing, he can still acquire ownership by long possession in good faith. 2. He says that the same applies also, if I buy a thing which I know to be subject to a pledge.

44 PAPINIAN, *Questions, book 23:* A man about to go on a journey buried money in the earth for safekeeping; the question was asked whether, if, on his return, he could not recall the hiding-place, he ceased to possess the money or, if he subsequently remembered the spot, he immediately began to possess it. I said that since it was stated that the money was buried for safekeeping, the concealer's right of possession did not appear to have been taken away from him and a lapse of memory does not adversely affect a possession which no one else has infringed; otherwise, we would have to answer that we have lost possession from one minute to another of slaves who are not in our sight. And it is of no consequence whether I buried the money on my own or on someone else's land, since, if someone else buried money on my land, I would possess it only if I obtained possession of it above ground. Hence, the fact that the land is another's does not take away my possession, since it is of no consequence whether I possess above or below ground. 1. The question was asked why possession is acquired for those who know nothing of it through a slave in respect of his *peculium*. I said that for reasons of convenience, the rule was adopted as an exception so that owners would not be obliged to find out at any given time the forms and titles of *peculia*. This does not mean, however, that the owner acquires possession by intent alone; for if something is acquired other than through the *peculium*, the owner's intention is indeed necessary; but possession is acquired physically through the slave. 2. These explanations given, I may say that when the question is one of the loss of possession, it is of great relevance whether we possess personally or through someone else; for in the case of things that we ourselves physically hold, we lose possession by intent, or even physically, if we leave the thing with the intention not to possess it; but possession of what is physically held by a slave or a tenant is lost only if someone else enters upon it; and it is then lost even without our knowledge of the fact. This distinction also exists in the matter of loss of possession. For summer and winter pastures of which possession is retained by intent,

45 PAPINIAN, *Definitions, book 2:* even though we have no slave or tenant there,

46 PAPINIAN, *Questions, book 23:* the previous possessor is said to possess even though another has entered the pasture with the object of possessing it, so long as he is in ignorance of the entry. For just as the bond of an obligation is released in the same

way that it is normally created, so also possession which is held solely by intention should not be taken away from one ignorant of the facts.

47 PAPINIAN, *Questions, book 26:* A reply was given that if you decide to possess and not to return a movable thing which has been deposited with or lent to you, I immediately lose possession, even though I do not know it; the explanation for this, perhaps, is that, in the case of movables, neglect or failure to keep them safe is generally deleterious to the erstwhile possession even though no one else intrudes upon it; the younger Nerva reports this rule in his work on usucapions. He also writes that the case is different with failure to keep safe a borrowed slave; for the original possession of him continues so long as no one else takes possession of him, doubtless because, by resolving to return, a slave, through whose person we can possess other things, can preserve his master's possession of himself. Accordingly, possession is lost forthwith of irrational and inanimate things, but assuming their intention to return, slaves are retained.

48 PAPINIAN, *Replies, book 10:* A man made a gift of land with slaves and stated in writing that he had delivered possession of them. Even if only one of the slaves given with the land should come to the donee and by him be sent back shortly to the land, it will be manifest that possession of the land and of the other slaves is acquired through that slave.

49 PAPINIAN, *Definitions, book 2:* Possession is also acquired through a slave in whom I have a usufruct in respect of my resources or through his labor; for the slave is held in fact by the fructuary and possession borrows heavily from right. 1. Those in another's power can hold a thing in *peculium*, but they cannot have and possess it, because possession is a matter not merely of fact but also of right. 2. Although possession is acquired through a procurator, even by one who does not know it, usucapion will run only for one aware of his possession; the action for eviction against the vendor, however, is not granted to the principal without the procurator's consent, but the latter will be required by the action on mandate to cede it to the principal.

50 HERMOGENIAN, *Epitome of Law, book 5:* By a reasonable error, I think someone to be my son and in my power; through him, not possession nor ownership nor anything else is acquired for me in respect of my property. 1. Possession is acquired for us through a runaway slave, so long as he is not possessed by someone else or he does not believe himself free.

51 JAVOLENUS, *From the Posthumous Works of Labeo, book 5:* Labeo says that there are some things of which we get possession by intention; suppose that I buy a pile of logs and the vendor tells me to take them away; as soon as I put a guard upon them, they are regarded as delivered to me. The same rule applies in respect of wine sold, if all the jars of wine are then together. But, he says, let us consider whether actual physical delivery is not made in such cases; for it is of no moment whether safekeeping be given to me personally or to anyone whom I direct. I think that the crux of the matter is whether, although the pile of logs or the jars are not physically taken up, nonetheless, they are regarded as delivered; I see no significance in whether I myself

or another at my behest guards the logs; in either case, possession must be determined, in some degree, by intention.

52 VENULEIUS, *Interdicts, book 1:* The grounds of possession and those of usufruct must not be confused any more than possession and ownership should be confused; for it is no barrier to possession that another has enjoyment and no one's usufruct is diminished by another's possession. 1. One forbidden to build is obviously barred also from possession. 2. One way of introducing into possession is to prohibit the use of force against one entering; for [the praetor] bids the opponent to yield forthwith and to leave possession vacant; and that is much more than restoration.

53 VENULEIUS, *Interdicts, book 5:* Against third parties, even vicious possession is normally of avail.

3

USUCAPIONS AND USURPATIONS

1 GAIUS, *Provincial Edict, book 21:* Usucapion was introduced for the public weal, to wit, that the ownership of certain things should not be for a long period, possibly permanently, uncertain, granted that the period of time prescribed should suffice for owners to inquire after their property.

2 PAUL, *Edict, book 54:* Usurpation is an interruption of usucapion; usurpation, however, is also a term used by orators to mean frequent use.

3 MODESTINUS, *Encyclopaedia, book 5:* Usucapion is the acquisition of ownership by continued possession for the period prescribed by law.

4 PAUL, *Edict, book 54:* Our next task is to discuss usucapion. And following the same order, we must consider who can usucapt, what he may usucapt and within what period. 1. Obviously, a head of household can usucapt. A son-in-power who is a soldier in camp also usucapts what he acquires by reason of his service. 2. If a *pupillus* takes possession with his tutor's *auctoritas*, he may usucapt; but we must say that even if he takes possession without such *auctoritas* but with the intention of possession, he may equally usucapt. 3. A lunatic may usucapt what he began to possess before losing his reason. But such person may usucapt, only if he possesses the thing on a ground from which usucapion follows. 4. A slave cannot possess as an heir. 5. Produce, the issue of slave-women, and the young of cattle, assuming that they are not dead, can be usucapted. 6. Now, when the *lex Atinia* says that a stolen thing can be usucapted only if it has first returned into the power of the person from whom it was appropriated, this is to be interpreted as meaning that it must return into the power of its actual owner, not into that of the person from whom it was in fact taken. Hence, if a pledge be stolen from the pledgee or a borrowed thing from the borrower, the thing must return to the power of its real owner. 7. Labeo says further that if a thing from my slave's *peculium* be stolen without my knowledge thereof and the slave later takes possession of it, it is deemed to have returned into my power; it would more appositely be said that it returns to my power if I know of the fact (for it is not enough that the slave should take the thing which he lost when I knew nothing of the matter); but this is so only if I wished it still to be part of the *peculium*; should that not be the case, it is necessary that I acquire disposal of the thing. 8. Thus, supposing my slave himself to take something from me and then to replace it, it can be usucapted, as though it has returned into my power, granted my ignorance thereof; if I knew the circumstances, we would insist that I should know that it has returned into my power. 9. Then again, if the slave held the thing which he appropriated by virtue

of his *peculium*, Pomponius says that it is not regarded as returned to my power, unless I have begun to possess it again as I did previously, before the appropriation, or, having retaken it, I allow him again to hold it in *peculium*; Labeo says the same. 10. Suppose that I deposit a thing with you and you sell it with a view to gain and then, out of remorse, you re-acquire it and hold it as it was before; whether I know or do not know that these things have happened, the thing is deemed to have returned to my power according to the view of Proculus, which is correct. 11. If a thing be stolen from a *pupillus*, it must be said that it is enough that his tutor knows it to have been returned to the house of the *pupillus*; and in the case of a lunatic, that his curators know. 12. A thing is to be held to have returned to its owner's power when he has taken lawful possession of it, so that it cannot be taken away, and as his own thing; for if I unwittingly buy a thing which was stolen from me, it is not regarded as returning to my power. 13. But if I bring a *vindicatio* for a thing stolen from me and accept an award of damages in respect of it, then, although I do not actually take possession of it, it becomes capable of usucapion by others. 14. The same holds good if it is delivered to a third party by my wish. 15. An heir, who succeeds to the rights of the deceased, does not usucapt when a slave-woman, whom he does not know to be stolen, conceives and is delivered, while in his possession. 16. The question has been asked whether I can usucapt the child, conceived when his mother is among my assets, of a stolen slave-woman given to me by my slave to obtain his own freedom. Sabinus and Cassius think not because the possession, viciously acquired by a slave, adversely affects his master; and that is the correct rule. 17. Equally, if some third party should give me a stolen slave-woman, so that I should manumit my slave, and she conceives while with me and brings forth a child, I do not usucapt it. The answer would be the same, even if the person gave her to me in exchange or in discharge of an obligation or as a gift. 18. If her purchaser should learn, before she gives birth, that the woman belongs to someone else, we have said that he cannot usucapt; but if he remains ignorant of the fact, he can usucapt. Now should he, in the course of usucapion, learn that she belongs to another, we must look to the beginning of his usucapion as is the accepted rule in respect of things bought. 19. The wool of stolen sheep cannot be usucapted, if they are sheared when with the thief, but can be, if they are with a purchaser in good faith; since wool is produce, it does not require usucapion, becoming at once the property of the purchaser. The same is to be said of lambs, if they have been disposed of; and that is correct. 20. If you make a garment out of stolen wool, the truer view is that we look to the material, and so the garment will also be a stolen thing. 21. If the debtor removes and sells a thing which he has given in pledge, Cassius writes that the thing can be usucapted because it is seen to have returned into the power of its owner, the pledgor, even though the action for theft will lie against him; I think this to be rightly said. 22. If you forcibly expel me from the possession of land and do not yourself take possession but Titius enters into vacant possession, ownership of the land can be acquired by long possession; for although the interdict *unde vi* will lie, since it is true that I was forcibly evicted, it is not true that the land is possessed by force. 23. But even if you evict me who am possessing land in bad faith and sell the land, it cannot be usucapted, because the fact is that it is possessed by force, although not against the owner. 24. The same holds good of one who evicts a person possessing as heir, because, although he knows the land to be part of an inheritance, he possesses it by force. 25 (26). If the owner of land evicts one who took possession of it by force, Cassius says that the land is not regarded as having returned into his power, since he will be restored to possession by the interdict *unde vi*. 26 (27). If I have a right of way over your land and you expel me from it by force, I will lose the right of way by nonuse over a long period, because an incorporeal right cannot be regarded as possessed and no one can be evicted from a right of way, that is, a pure right. 27 (28). Again, if you take vacant possession and then refuse entry to the owner who comes along, you will not be held to possess by force. 28 (29). The truer view is that release from servitudes can be usucapted, because the *lex Scribonia* abolished the usucapion which creates a servitude but not that which grants liberty,

removing the servitude. Hence, if I am under a servitude to you, say, not to build above a certain level and I have had a building above that level for the prescribed period, the servitude will be discharged.

5 GAIUS, *Provincial Edict, book 21:* Possession is broken in fact when someone is forcibly evicted from possession or the thing is seized from him. And, in such a case, the possession is broken not only against the person who seizes the thing but against everyone. In these cases, it matters nothing whether the usurper is the owner of the thing or not; no more does it matter whether he possesses as his own or on a profitable ground.

6 ULPIAN, *Edict, book 11:* In the matter of usucapion, we do not count from minute to minute, but to the very end of the last day.

7 ULPIAN, *Sabinus, book 27:* Consequently, one who commenced possession at the sixth hour on the first of January will complete usucapion at the sixth hour of the night before the first of January next.

8 PAUL, *Edict, book 12:* Labeo and Neratius say that things which slaves acquire by way of their *peculium* can be usucapted because their owners usucapt such things, even when they do not know of them; Julian writes to the same effect. 1. Pedius writes, however, that one who can usucapt nothing in his own name cannot do so either through a slave.

9 GAIUS, *Provincial Edict, book 4:* Corporeal things especially are the objects of usucapion, with the exception of sacred and dedicated things, the public property of the Roman people and of *civitates*, and also freemen.

10 ULPIAN, *Edict, book 16:* If a third person's thing be bought in good faith, the question arises whether, for usucapion to run, we require good faith at the very inception of the sale or at the moment of delivery. The view of Sabinus and Cassius has prevailed that we look to the moment of delivery. 1. The rule which we observe is that servitudes can never be usucapted of themselves, but they can be with buildings. 2. Scaevola, in the eleventh book of his *Questions*, writes that Marcellus held the opinion that if a cow conceived whether while with the thief or the heir of the thief and it gives birth while with the thief's heir, the calf now separated cannot be usucapted by the heir, any more, he says, than could the child of a slave-woman. Scaevola, though, writes that his own view is that the calf and the child can be usucapted; for the issue is no part of the stolen thing. If, indeed, it were part, it could not be usucapted, even if the birth took place when the mother was in the hands of a purchaser in good faith.

11 PAUL, *Edict, book 19:* A slave cannot possess nor can a master who is a prisoner of war possess through a slave.

12 PAUL, *Edict, book 21:* If you knowingly buy something from one forbidden by the praetor to alienate his property, you cannot usucapt it.

13 PAUL, *Plautius, book 5:* We do not usucapt what we hold in pledge because we possess it as another's. 1. The answer was that one can usucapt what one buys in good faith from a lunatic. 2. If I gave you a mandate to buy land, you will acquire ownership of it, on its delivery to you, by long possession, even though you could be regarded as not possessing for yourself, since it makes no difference that you are liable to the action on mandate.

14 PAUL, *Plautius, book 13:* The period that the vendor possessed before the sale runs for the purchaser. But if the vendor acquires possession after the sale, that does not avail the purchaser. 1. In respect of the thing bequeathed to him, the legatee is, for the purpose of counting the period of the testator's possession, in a sense in the position of an heir.

15 PAUL, *Plautius, book 15:* If one possessing as a purchaser should be captured by the enemy before usucapion has been completed, we have to consider whether usucapion continues to run for his heir; for the usucapion has been broken, and if it would not avail the purchaser himself on his return, how can it benefit his heir? It is, after all, true that he has ceased to possess during his lifetime and *postliminium* does not avail him, so that he should be regarded as having usucapted. But if the slave of a prisoner of war should buy something, Julian says that the matter of its usucapion is in suspense; for if the master returns, he is deemed to have usucapted; if, though, he should die in enemy hands, a doubt arises whether, through the *lex Cornelia*, his successors own it. Marcellus says that the legal fiction should be accepted to its full extent. For in the same way, one returning with *postliminium* can have a greater right in what his slaves have done than in what he possessed, personally or through a slave, at the time of his capture. An inheritance is in certain respects held to represent the person of the deceased. In consequence, usucapion is not held to run for successors. 1. If a slave whom I was possessing should run away, he is deemed to be possessed by his owner, if he conducts himself as a freeman. But this is to be held applicable only if, when retaken, he is not prepared to litigate the issue of his free status; for if he is so prepared, he is not held to be possessed by the owner to whom he makes himself ready as an opponent in legal proceedings. 2. If a possessor in good faith should learn, before completing usucapion, that the thing belongs to a third party and then, having lost possession, subsequently regain it, he cannot usucapt because the commencement of his second possession is flawed. 3. If a thing due to us under a will or a stipulation is delivered, it is our state of mind at the time of delivery which is to be considered; for it is acknowledged that one may stipulate for something which does not belong to the promisor.

16 JAVOLENUS, *From Plautius, book 4:* An action for production, in respect of a slave given in pledge, may be brought against the pledgee, not the pledgor, because one who gives a pledge possesses only for the purpose of usucapion but, for all other purposes, the pledgee is possessor, so that there may be computed also the period of possession of the pledgor.

17 MARCELLUS, *Digest, book 17:* If, in error, I commence possession of a stranger's land as having been awarded from land owned in common, by an adjudication in an action to divide common property, I can become owner of it by long possession.

18 MODESTINUS, *Rules, book 5:* Although usucapion does not run against the imperial treasury, nevertheless, one who purchases land from an estate which, though vacant, has not yet been claimed for the public, will lawfully acquire ownership of it by long possession; this has been stated in an imperial ruling.

19 JAVOLENUS, *Letters, book 1:* Suppose that you buy a slave with a provision that if a certain condition should eventuate, he will be unsold, that the slave is delivered to you, and that subsequently the sale goes off under the condition; I think that the period that the slave is with the purchaser accrues to the vendor because a sale so

avoided is like the case of rescission in which I have no doubt that the period of holding by the person returning the slave accrues to the vendor, because the transaction cannot be properly called a sale.

20 JAVOLENUS, *Letters, book 4:* The testator's possession runs for his heir, provided that there is no intervening possession by another.

21 JAVOLENUS, *Letters, book 6:* I let land to one against whom I was usucapting as heir; my question is whether this letting is of any consequence; and if you think it irrelevant, are you of opinion that the usucapion still runs? I ask further: If I should have sold the land to the same person, what is your view of these issues which I have put to you? The reply was that if one possessing land as heir let it to its owner, the letting would be nugatory because the owner would be hiring his own thing; accordingly, it follows that the lessor would not even retain possession; and so long-term prescription would not continue. The rule in respect of letting applies also to sale, since one cannot purchase one's own property.

22 JAVOLENUS, *Letters, book 7:* Although heir and inheritance have separate designations, they fill the place of one person.

23 JAVOLENUS, *Letters, book 9:* I think that one who buys a building possesses only the building itself; for if he be deemed to possess the individual elements, he will not possess the building as such; for the individual elements of which the building is composed being detached, one cannot conceive of the building as a unit. It follows that if someone says that he possesses individual items, it would be necessary that he should say that there is scope for the possession of the surface area only for the period ordained for movables but of the soil over a longer period. But it would be absurd, and quite incompatible with the civil law, that the same thing should be usucapted at different times; suppose a building to consist in two elements, the site and the surface, and their totality should vary the possession period of all the immovables. 1. But if you should be evicted from a column, I think that you can validly bring the action on purchase against the vendor, and in this way, the whole thing will be conserved. 2. Now if a house should be demolished, the movable items can be possessed, once more, so that they may be usucapted during the period laid down in respect of the uscapion of movable things. And you cannot legally invoke in aid the period that they were part of the building. For, in the same way that you did not possess them separately and apart from the building as such, so also these items are not with you, separately and individually when the building is pulled down, but cohering in the building which comprises them. Nor can it be accepted that the same thing can be possessed both as part of the land and as a movable in itself.

24 POMPONIUS, *Quintus Mucious, book 24:* Where statute prohibits usucapion, possession in good faith avails no one. 1. Sometimes, though, even though it was not the deceased who initiated possession, the possession runs for his heir; suppose, for instance, that a defect, emanating not from the person of the possessor, but from the circumstances themselves, should be remedied, as when a thing ceases to belong to the treasury or to be stolen or possessed by force.

25 LICINNIUS RUFINUS, *Rules, book 1:* Without possession, there can be no usucapion.

26 ULPIAN, *Sabinus, book 29:* The surface can never be acquired by long possession without the underlying soil.

27 ULPIAN, *Sabinus, book 31:* Celsus, in his thirty-fourth book, says that those people are mistaken who hold that if a man takes possession of a thing in good faith, he can

usucapt it as his own, and it is irrelevant whether he did or did not buy it, whether or not it was given to him, provided that he thinks he bought it or received it as a gift, because there is no effective usucapion unless there be, in truth, a legacy, a gift, or a dowry, although the recipient believes so. The same applies in respect of an award of damages in lieu of restoration of the thing itself in that unless the party concerned genuinely accepts an award of damages, the thing will not be open to usucapion.

28 POMPONIUS, *Sabinus, book 17:* If a thing be delivered to the slave of an infant or of a lunatic, it is settled law that such persons can usucapt through the slave.

29 POMPONIUS, *Sabinus, book 22:* Although, in fact, I was sole heir, I thought that you were also an heir in part and delivered to you assets of the inheritance accordingly. The more appropriate answer is that these things cannot be usucapted because one cannot usucapt, under the title of heir, what one possesses as, in fact, heir and there is no other ground of possession. This, though, holds good so long as what was done was not done by way of *transactio*. We would say the same if you thought yourself to be heir; for, here again, the possession of the true heir would be an obstacle to you.

30 POMPONIUS, *Sabinus, book 30:* The question has been posed whether the mixing-up of things breaks the erstwhile usucapion of each element. Now there are three kinds of things: One is that suffused by a single spirit, which the Greeks call unitary, a slave, for instance, a beam of wood, a stone, and the like; another is that compounded of cohering individual elements, which is described as constructed, a house, say, a ship, or a cupboard; the third is that which is composed of individual entities, subsumed under one designation, such as a nation, a legion, or a flock. That the first kind should be open to usucapion presents no problem, but the other two do. 1. Labeo says in his *Posthumous Works* that if a man who needs ten days to complete usucapion of tiles or columns should incorporate them into a building, he will usucapt all the same, if he possesses the building. What, then, of things which do not become embedded in the soil but remain removable, say, jewels in a ring? In such a case, it is true that since each remains intact, both the gold land the jewel can each be possessed and usucapted. 2. We must now look to the third case. A flock or herd is not usucapted in the same way as individual things nor yet as those which are constructed or put together. What, then, is the position? Although the essence of a flock is such that it subsists through the accretion of animals, there is no usucapion of the flock as such; just as there is possession of individual animals, so also is there usucapion of them. Hence, if a purchased beast be incorporated with a view to augmenting the flock, the ground of its possession is not changed so that if the rest of the flock belongs to me, I own this beast also. But the individual animals have their own grounds of acquisition, and so if any of the flock be stolen animals, they are still not usucapted.

31 PAUL, *Sabinus, book 32:* An error of law never benefits the possessor in the matter of usucapion. Accordingly, Proculus says that if a tutor gives *auctoritas* in error to his *pupillus* at the beginning of a sale or even some time well after the sale, there can be no usucapion by reason of the error of law. 1. In the usucapion of movables, a continuous period is computed. 2. Though living in a state of liberty, a slave possesses nothing nor does anyone else possess through him. But if, while at liberty, he takes possession of something in another's name, he acquires possession for that other. 3. If my slave or son-in-power holds anything by way of *peculium* or in my name, I possess or even usucapt it through him, although I am unaware of it; and if he should go mad, then, so long as the thing remains in the same condition, it is to be understood that possession remains in me and usucapion continues to run, just as would be the

case if such person was asleep. The same is to be said in respect of a tenant, agricultural or urban, through whom one possesses. 4. If someone should acquire possession of a thing by force, stealth, or *precarium*, and subsequently go mad, the possession and the ground thereof remain in the case of what the lunatic holds by *precarium*, so that the interdict *uti possidetis* may properly be brought in the name of the lunatic in respect of the possession which he acquired before losing his reason or which he acquired, after going mad, through another. 5. The time that an inheritance lies vacant, whether before or after its acceptance, runs for the heir. 6. Julian says that the heir usucapts a thing which the deceased bought but which he, the heir, thinks to have been possessed by way of gift.

32 POMPONIUS, *Sabinus, book 32:* If a thief should buy the stolen thing from its owner and hold it as having been delivered, he ceases to possess it as stolen and begins to possess it as his own. 1. Should a person believe that statutes do not allow him to usucapt something which he possesses, it must be said that even though he be mistaken, usucapion does not run for him, either because he is not to be regarded as possessing in good faith or because usucapion does not run for one mistaken in law. 2. No one can possess an unquantified share; and so Labeo writes that if there be several people on a piece of land and they do not know what share each has, none of them possesses by mere supposition.

33 JULIAN, *Digest, book 44:* Not only a purchaser in good faith but anyone possessing on a ground from which usucapion follows acquires by usucapion the child of a stolen slave-woman; this I judge to have been introduced by legal logic; for assuming the *Twelve Tables* and the *lex Atinia* to present no barrier, whatever the ground on which a person is usucapting the woman, on the same ground the child perforce is usucapted, if it be conceived and born in his household before he is aware that the mother is stolen. 1. The common proposition that a man cannot change the ground of his own possession is true whenever a person knows that he does not possess in good faith and begins to possess with a view to his own gain. This can be demonstrated as follows. If a man buys land from one whom he knows not to be its owner, he will possess it simply as possessor; but if he then buys the same plot from its owner, he begins to possess it as purchaser, and he is not to be regarded as himself having changed the ground of his possession. The law will be the same if he buys from a nonowner, believing him to be owner. So also, if he be instituted heir by the owner or given *bonorum possessio* of the latter's estate, he will begin to possess the land as heir. Moreover, if he should have good ground for believing that he is heir of the owner or the *bonorum possessor* of the owner's estate, he will possess the land as heir and will not be regarded as himself changing the ground of his possession. Now, granted that all this applies in respect of one who has possession, how much more should it not be applicable to the agricultural tenant who has no possession, whether the owner be alive or dead? Certainly, though, if the tenant, on the death of the owner, were to buy the land from one whom he believed to be the heir of the owner or the possessor of his estate, he will begin to possess it as purchaser. 2. Should the owner of land think that armed men are approaching and on that account take flight, he is to be regarded as forcibly evicted, even though none of them enters on his land; all the same, that land, even before its return to the owner's control, could be usucapted by a possessor in good faith because the *lex Plautia* and also the *lex Julia* forbid only usucapion of what is possessed by force, not of that of which one is forcibly dispossessed. 3. Suppose that Titius from whom I wish to claim a piece of land should cede possession of it to me; I will have a valid title for usucapion. Furthermore, a man from whom I wished to claim a piece of land by virtue of a stipulation would, by yielding up possession of it to me in satisfaction of his obligation, automatically entitle me to acquire ownership of the land by long possession. 4. A person giving a thing in pledge usucapts it so long as it is in the creditor's

hands; but if the creditor delivers possession of it to someone else, the usucapion is broken. In the matter of usucapion, the case is similar to that of one who deposits or lends something for use; it is obvious that they cease to usucapt if the thing deposited or lent be transferred to another by the depositee or borrower. But if the creditor takes only a bare hypothec of the thing, the debtor's usucapion continues to run. 5. Suppose that I possess something of yours in good faith and I give it to you in pledge, you being unaware that the thing is yours; I cease to usucapt because no one is deemed to contract a pledge of his own property. But if the pledge was by mere agreement, I will still continue to usucapt because in this case no pledge is regarded as actually given. 6. Should a slave of the creditor steal a pledged thing which the creditor possesses, the debtor's usucapion is not interrupted, because the slave does not oust his master from possession. Even if a slave of the debtor stole it, then, although the creditor ceases to possess it, the debtor's usucapion continues to run, regardless, no less than if the creditor himself delivered the thing to the debtor; for in the matter of usucapion, slaves cannot prejudice their masters' position by stealing the thing. This is more obvious in the case of a slave appropriating from a debtor holding the thing at the creditor's will. Hiring, again, produces the same result. But if the thing be in the creditor's hands, he is then its possessor. Now if the debtor both got a *precarium* of and hired the pledge, the creditor is to be held possessor and the *precarium* does not bring it about that the debtor has possession but only that he may hold the thing.

34 ALFENUS VARUS, *Digest, Epitomized by Paul, book 1:* If a slave, his owner being unaware of the transaction, sells something belonging to his *peculium*, the purchaser can usucapt it.

35 JULIAN, *Urseius Ferox, book 3:* Suppose that a slave, in whom a usufruct has been bequeathed, be stolen before the heir ever takes possession of him; the question has been raised whether he can be usucapted, since the heir has no action for theft in respect of him. The answer of Sabinus is that there can be no usucapion of one in respect of whom the action for theft lies and the potential usufructuary can bring the action for theft. This assumes that the fructuary could use and profit by him; otherwise, the slave does not come into the reckoning; but if a slave be stolen from one using and profiting by him, not only the fructuary but also the heir can bring the action for theft.

36 GAIUS, *Common Matters or Golden Things, book 2:* There are many ways in which it can happen that a person, laboring under a misapprehension, may sell or give as his own what in fact belongs to another and yet the thing can be usucapted by a possessor in good faith; for instance, an heir, thinking the thing to belong to the deceased, may alienate what was only lent, let to, or deposited with the deceased. 1. Similarly, if someone, under a false delusion, believe that an inheritance belongs to him, when it does not, and he alienate a thing, part of the inheritance, or again if one, having the usufruct of a slave-woman, think her offspring to be his property, since the issue of cattle belong to the fructuary, should dispose of the child,

37 GAIUS, *Institutes, book 2:* he does not commit theft; for no theft is committed unless a theftuous intention exists. 1. Again, one can acquire possession of someone else's land without force; it could be that the land lies vacant through the owner's neglect of it or because he has died without a successor or because he has been long absent from it.

38 GAIUS, *Common Matters or Golden Things, book 2:* There is land which a man cannot usucapt for himself, because he knows that he possesses someone else's thing and is thus in possession in bad faith. But if he delivers it to someone else who accepts it in good faith, the latter can usucapt it, because he possesses what has come into his possession neither by force nor by stealth; for we have discarded the view of some of

the earlier jurists who took the line that there can also be theft of land or sites.

39 MARCIAN, *Institutes, book 3:* If the land itself can not be usucapted, neither can its surface.

40 NERATIUS, *Rules, book 5:* It has been ruled that a usucapion begun by the deceased can be completed even before the inheritance is accepted.

41 NERATIUS, *Parchments, book 7:* If my procurator should obtain a thing taken from my possession, since it is now generally agreed that we acquire possession through a procurator, it is to be held that the thing thereby returns to my possession and may be usucapted; any other rule would be captious.

42 PAPINIAN, *Questions, book 3:* When a husband sells dotal land, whether or not the purchaser knows that it is part of a dowry, the sale is not valid. It can be agreed to confirm it, after the death of the wife during the subsistence of the marriage, if the whole dowry redounds to the husband's benefit. The same rule applies if one who sells a stolen thing later becomes the heir of the owner.

43 PAPINIAN, *Questions, book 22:* The heir of a purchaser in good faith does not usucapt the thing, when he knows that it belongs to someone else, if possession is delivered to him personally; but continuation of the purchaser's possession would not be affected adversely by the heir's knowledge. 1. It is certain that the head of household will not usucapt what his son buys, if either he or the son knows the thing to belong to another.

44 PAPINIAN, *Questions, book 23:* Laboring under an honest error, I thought that Titius was my son and in my power, although there had been no valid *adrogatio*; I am of opinion that I cannot acquire through him in respect of my property. For in such a case, there has not been adopted the rule which was accepted for a freeman in a state of servitude in good faith; for there, by reason of the regular, daily traffic in slaves, it was in the public interest to adopt the rule which we have; we frequently in ignorance buy freemen; but the adoption or *adrogatio* of sons is neither so simple nor so common. 1. It is settled that if you sell me someone else's thing, I being aware of the fact, but you deliver it only once the owner has ratified the transaction, it is the time of delivery to which we look, and the thing becomes mine. 2. Although, for the purposes of usucapion, it is the commencement of possession, not the initiation of the transaction, to which we look, it not infrequently happens that we look not to the beginning of the present possession, but to the earlier ground of the delivery, founded on good faith; for instance, in respect of the issue of a slave-woman whom one begins to possess in good faith, nonetheless, one will usucapt the child, although one becomes aware, before it is born, that the mother belongs to someone else. The same is true of a slave returning with *postliminium*. 3. The period that an inheritance remains unaccepted runs for usucapion, whether a slave of the inheritance buys something or the deceased had begun to usucapt; these lines, however, are followed by way of an exception. 4. A son-in-power who buys someone else's thing, when he is unaware that he has become independent, himself begins to possess the thing when it is delivered to him; why should he not usucapt it, since good faith was present at the taking of possession, even though he mistakenly thought that he was one who could not possess for himself a thing obtained by way of *peculium*? The same is to be said if, having good grounds for his belief, he thinks the thing bought to have come to him from his father's inheritance. 5. Supervening usucapion as purchaser or heir does not prevent a claim for a pledge; for, just as usufruct cannot be usucapted, so a claim for pledge, which is linked with no community of ownership but is created purely by agreement, is not destroyed by usucapion of the thing. 6. If a man goes mad after commencing usucapion, reasons of convenience say that he can in every way complete usucapion so that the affliction of his mind shall not also affect his substance. 7. If a slave or son should buy something while the head of household is in enemy hands, does the latter begin to hold it? If, indeed, the thing be possessed by way of *peculium*, usucapion begins and the master's captivity is no obstacle, since his knowledge is not necessary, even if he were in the *civitas*. But if it be not acquired as *peculium*, he cannot be deemed to usucapt it or to acquire it by *postliminium* because it is first necessary for a thing to

be usucapted that it be possessed. Now if the head of household should die in captivity, since such persons are treated as dead from the moment of their capture, the son can be said to have possessed for himself and to have usucapted.

45 PAPINIAN, *Replies, book 10:* Prescription by long possession is not conceded by the law of nations for the acquisition of public land. This is the case if, when the building which he had erected on the seashore is totally demolished (perhaps he pulled it down or abandoned it), a man opposes another subsequently building and occupying in the same place, or again, if a person, because he alone has fished in a reach of a public river for some years, refuses someone else the same right. 1. Suppose that after the master's death, a slave of his inheritance should begin to hold a thing by way of *peculium;* usucapion will first commence upon the acceptance of the inheritance; for how could there be usucapion of what the deceased did not previously possess?

46 HERMOGENIAN, *Epitome of Law, book 5:* A man usucapts in satisfaction a thing which he receives in respect of a debt; and not only the actual thing due but anything given in respect of a debt can be usucapted under this head.

47 PAUL, *Neratius, book 3:* If my procurator should buy and take a thing in my name without my knowledge, then, although I possess it, I will not usucapt it; for it is accepted that usucapion in ignorance is applicable only to things in a *peculium.*

48 PAUL, *Handbook, book 2:* If I deliver something to you, thinking that I am under a duty to do so, usucapion will follow only if you also think that it is due to you. It would be another matter if I thought myself liable on a sale and therefore delivered it to you; for, in this case, if there be no prior purchase, there can be no usucapion as purchaser. The ground of distinction is this: in other cases of performance, we look to the time of performance, and when I stipulate, it does not matter whether I know the thing to belong to someone else or not; it is enough that I think the thing yours when you make performance; but in the case of sale, we consider both the time of contract and the time of performance; and a nonpurchaser cannot usucapt as purchaser or in satisfaction as in other contracts.

49 LABEO, *Plausible Views, Epitomized by Paul, book 5:* If something be stolen, it cannot be usucapted until it has returned to the control of the owner. PAUL: No, quite the contrary; for if you take away what you gave me in pledge, it will become a stolen thing; but as soon as it comes back into my control, it can be usucapted.

4

USUCAPION AS PURCHASER

1 GAIUS, *Provincial Edict, book 6:* A possessor who submits to a judicial assessment of the value of the thing begins to possess as a purchaser.

2 PAUL, *Edict, book 54:* A person possesses as purchaser who genuinely purchases a thing, and it is not sufficient for him simply to be of the belief that he possesses as purchaser; there must be an underlying purchase. Now if, thinking that I have to, I deliver a thing to you who are unaware of my belief, you will usucapt the thing. Why, then, should you not usucapt when I think that I have sold you what I deliver to you? It is because in other contracts the time of delivery alone suffices so that if in full knowledge I stipulate for a thing belonging to another, I will usucapt it if at the time of delivery I believe it now to belong to the transferor; but in the case of sale, we look also to the time of contracting so that a person must both have purchased in good faith and taken delivery in good faith. 1. The grounds of possession and of usucapion are distinct; for a man may be rightly held to have purchased, but in bad faith; so that one who knowingly buys what belongs to another possesses it as purchaser although he does not usucapt it. 2. If a sale be made subject to a condition, the purchaser cannot usucapt while the condition is pending. The same applies if he thinks that it has been realized when it has not; for he is like someone who thinks that he has made a pur-

chase. But if the condition has been realized but he does not know it, we can say with Sabinus to whom fact is more important than opinion that he usucapts. There is this difference: When he thinks the thing to be someone else's and it is in fact the vendor's, he has the mental attitude of a purchaser, but when he thinks that the condition has not been realized, he thinks that he has not yet bought it. It can be more obviously questioned, when the deceased bought something which is delivered to his heir, who is unaware of the deceased's purchase and thinks it delivered on some other ground, whether usucapion does not run. 3. Sabinus says that if a thing be sold with a provision that if the price be not paid by a certain date, the sale will be off, there will be no usucapion if the price has not been paid. Let us, though, consider whether the provision is a condition or rather a pact; if it be the latter, it is a matter of dissolving the contract not of implementing it. 4. If a sale be made with an *in diem addictio*, that is, unless someone shall have made a better offer, in Julian's opinion, the sale is perfected, the produce becomes the property of the purchaser and usucapion runs; other jurists think that such a sale, too, is contracted subject to a condition, but he says that it is not contracted conditionally but is defeasible conditionally; and that is the correct opinion. 5. Again, that sale is unconditional in which it is agreed that if the thing proves unsatisfactory within a given period, the sale will be off. 6. I bought Stichus and Dama was delivered instead, I being ignorant of the fact; Priscus says that I do not usucapt him because what has not been bought cannot be usucapted as purchaser. But if land is purchased and more is possessed than was bought, the whole can be acquired by long possession, because the estate as such is purchased, not its individual parts. 7. You bought the estate of someone with whom slaves had been deposited; Trebatius says that you do not usucapt them because they were not part of the purchase. 8. A tutor buys, at the auction of the property of his *pupillus*, something which he thinks the property of the *pupillus*. Servius says that he can usucapt it; he was led to this opinion by the fact that the *pupillus* incurs no detriment in having a purchaser close to him, and if the tutor should buy cheaply, he would be liable in the action on tutelage, just as he would if he had knocked the thing down to someone else at a low price; this is also said to have been a ruling of the deified Trajan. 9. Again, many are of opinion that if a procurator buys something at an auction which he conducts on his principal's mandate, reasons of convenience allow him to usucapt it. On the same ground, the same rule would apply to one buying something when administering the affairs of another in the latter's ignorance. 10. If your slave buys, by way of *peculium*, something which belongs to another, you will not usucapt it, even though you do not know it to belong to another. 11. Celsus writes that if my slave takes possession of something in respect of the *peculium*, I usucapt it even though I do not know of it; but in the case of his acquisition on any other ground, my knowledge is essential for usucapion; and if he takes possession viciously, my possession will be vicious. 12. Again, Pomponius says that in cases where slaves possess something in their master's name, it is the mind of the master rather than that of the slave to which we must look; but in respect of things in the *peculium*, to the mind of the slave. And if the slave possesses something in bad faith and the master comes to hold it in his own name, say, by revoking the *peculium*, it must be said that the ground of possession remains the same, and so the master will still not usucapt the thing. 13. Celsus says that if a slave buys something in good faith under the head of *peculium* and, when I first hear of it, I know it to belong to someone else, usucapion will still run for me because possession began without flaw; but if, at the time of his purchase, I know the thing to be another's, though the slave was in good faith, I will not usucapt it. 14. Celsus further says that if my slave buys in bad faith something which he gives me in return for his liberty, I still will not usucapt it because the first ground of possession remains. 15. If I should buy something from a *pupillus* without his tutor's *auctoritas*, believing him to be over puberty, we hold usucapion to run so that here belief prevails over fact; if, on the other hand, you know him to be a *pupillus* but think that

pupilli can conduct their affairs without the *auctoritas* of their tutor, you will not usucapt because an error of law avails no one. 16. If I buy something from a lunatic whom I think to be sane, it is settled that on grounds of convenience, I will usucapt it, although the sale is void; and so I will have no action in the event of eviction and no *actio Publiciana*, and I cannot count the time for which the lunatic held the thing. 17. If you sell to me a thing which you are usucapting as purchaser and I know that it belongs to someone else, I will not usucapt it. 18. The possession of the deceased will run for the ultimate heir, even though the intermediate heir did not take possession of the thing. 19. If the deceased bought something in good faith, the thing will be usucapted, although the heir knows that it belongs to another. The same applies to a *bonorum possessor* of an inheritance, to beneficiaries under a *fideicommissum* to whom the estate has been transferred under the *senatus consultum Trebellianum*, and to other praetorian successors. 20. The period of possession of the vendor counts in the purchaser's favor. 21. If I buy a third person's thing and, while I am usucapting it, the owner claims it from me, my usucapion is not broken by joinder of issue. But if I choose to accept an award against me of the value of the object in dispute, Julian says that the ground of possession changes for one who so elects and that the same would hold good if the owner made a gift to the purchaser of what he bought from a nonowner; this opinion is correct.

3 ULPIAN, *Edict, book 75:* A judicial award of the value is akin to a purchase.

4 JAVOLENUS, *From Plautius, book 2:* The purchaser of an estate was aware that part of it belonged to another. The answer given was that he could usucapt none of the land. I think that this is true, if the purchaser does not know which part it is; but if he knows the specific plot, I do not doubt that he can acquire ownership of the rest by long possession. 1. The law is the same if a person who buys a whole estate knows that an unspecified part of it belongs to another; that part alone he will not usucapt; but there is nothing to prevent his acquisition of the rest by long possession.

5 MODESTINUS, *Encyclopaedia, book 10:* If I snatch away the thing which I gave you in pledge and sell it, there has been doubt over usucapion; but the better view is effectively to allow the period of usucapion.

6 POMPONIUS, *Sabinus, book 32:* A man who asks a *precarium* of something which he is usucapting as heir or as purchaser cannot usucapt; there is no difference between these cases because, either way, one who asks a *precarium* ceases to possess on the original ground of possession. 1. Suppose that I buy ten slaves and I think that some belong to another and I know who they are; I usucapt the rest; but if I do not know who they are, I usucapt none of them. 2. If the time necessary to complete usucapion expires after the death of the purchaser of a slave, the slave will belong to the heir, although the latter has not yet taken possession of him, provided that no one else has possessed him meanwhile.

7 JULIAN, *Digest, book 44:* A man possessing land as a purchaser died before completing the necessary period of possession; the slaves who were left in possession of the land quit with the intention of abandoning the land; the question was put whether the period of long possession nonetheless ran for the heir. I replied that despite the departure of the slaves, time ran for the heir. 1. If I am acquiring the Cornelian estate by long possession as purchaser and add to it part of an adjoining estate, do I acquire the whole by completing my time as purchaser or will the full period be necessary in respect of the addition? I replied that the parts added to the estate purchased have their own separate condition; and so possession must be taken of them separately, and the full period of long possession of them satisfied. 2. My slave gave Titius a mandate to buy an estate for him, and on the slave's manumission, Titius gave him possession of it; the question was: Could he acquire it by long possession? I replied: Even if, at the

time of the grant of possession by Titius, the slave thought that his *peculium* had been granted to him or, indeed, was unaware that it was not granted to him, the slave could in no way acquire by long possession, because he either knows or should know that his *peculium* has not been granted to him and consequently he is like one who pretends to be a creditor. However, if Titius knew that the freedman had not been granted his *peculium*, he should be deemed to make a gift rather than to make over land which was not due. 3. If a tutor should appropriate a thing belonging to his *pupillus* and sell it, there can be no usucapion of it until it returns into the control of the *pupillus*; for a tutor is regarded as an owner in the affairs of his ward, only when he is administering his guardianship, not when he is despoiling the *pupillus*. 4. A man who buys a third person's land in good faith and loses possession of it and, by the time that he regains possession of it, knows that it belongs to another does not acquire it by long possession because the inception of his second possession is not without defect; the case is not unlike that of a purchaser who, at the time of sale, believes the thing to belong to the vendor but, at the time of delivery, knows that it is a third person's; for once possession has been lost, one has to look to the start of the possession recovered. Hence, if a slave be returned, on the rescission of a sale, at a time when the vendor knows him to belong to someone else, there can be no usucapion, although, before the sale, he was in a position to usucapt. The law is the same in the case of one evicted from land who recovers possession of it by interdict, then knowing that it belongs to someone else. 5. One who knowingly buys something from one whom the praetor has forbidden to diminish the inheritance, as being a suspect heir, will not usucapt. 6. Suppose that your procurator, who could have obtained a hundred gold pieces for the land, asks only thirty for the sole purpose of causing you loss; there can be no doubt that, he being unaware of this fact, the purchaser will acquire title by long possession; for even when one aware of the facts sells a third person's land to one who is not, nothing prevents long possession. But if the purchaser should be in collusion with the procurator, bribing him to sell at an uneconomic price, he will not be held a purchaser in good faith and so will not usucapt the land. And if, when the principal sues, the purchaser should invoke the defense that the thing was sold with his consent, a replication of fraud will be effective against him. 7. Even if he possess it, a thing is not held to have returned to the control of its owner, if he does not know that it had ever been stolen from him; accordingly, if, you being ignorant of the circumstances, I give you in pledge a slave who had been stolen from you, and, the debt being paid, I sell the slave to Titius, Titius cannot usucapt him. 8. A freeman who is in servitude to us in good faith acquires for us in respect of our property by the same methods by which we are accustomed to acquire through our own slave; wherefore, both by delivery and by usucapion, we make a thing our own through a freeman intermediary, and if a purchase be made by him through a *peculium* which pertains to us, we usucapt it, even unwittingly.

8 JULIAN, *From Minicius, book 2:* If someone who knows that the vendor will immediately squander the money buys slaves from him, there are many who expressed the view that the purchaser is nonetheless in good faith, and that is the more correct view; for how can a man be regarded as buying in bad faith, if he buys from the owner, unless it chance that a purchaser would not usucapt the slaves, if he bought from a wanton who would forthwith lavish the money on a harlot?

9 JULIAN, *Urseius Ferox, book 3:* A man who accepts in return for his liberty a stolen slave-woman from his slave can usucapt her offspring as if he had bought her.

10 JULIAN, *Minicius, book 2:* A slave gave his master a slave-woman whom he had stolen in return for his liberty; the woman conceived. The question was whether the master could usucapt her child. This was the answer: The master can usucapt the child as though he had bought it; for he has parted with property in return for the woman

and a kind of sale has been concluded between the master and his slave.

11 AFRICANUS, *Questions, book 7:* The common opinion that one, who thinks himself to have bought something when in fact he has not, cannot usucapt, is, says [Julian], true insofar as the purchaser has no good ground for his mistaken belief; for if the slave or procurator whom he charged to buy the thing should persuade him that he had bought it and, on that ground, deliver it, the better view is that usucapion will follow.

12 PAPINIAN, *Replies, book 10:* When a legatee is given *missio in possessionem*, the goods will be usucapted but without affecting the praetorian pledge.

13 SCAEVOLA, *Replies, book 5:* A man bought in good faith a third party's site and, before completing the requisite period of possession, began to build there; he continued the building despite being given notice by the owner of the land while the requisite period of possession was still running; my question is whether his possession is thereby broken or, having started, continues. The reply was that on the case stated, there is no interruption of possession.

14 SCAEVOLA, *Digest, book 25:* The inheritance of their intestate sister devolved upon her two brothers, one of whom was present, the other, absent; the brother who was present conducted also the business of the absentee and, in the name of his brother and his own, sold all the land from the inheritance to Lucius Titius who bought it in good faith. The question was: When he knows that part belongs to an absentee, can the purchaser usucapt the whole? The reply was that if he believed the vendor to have his brother's mandate to sell, he would acquire ownership by long possession.

5

USUCAPION AS HEIR OR AS POSSESSOR

1 POMPONIUS, *Sabinus, book 32:* Nothing can be usucapted as heir from the estate of a living person, even though the possessor thinks the thing to be that of a dead man.

2 JULIAN, *Digest, book 44:* A person granted *missio in possessionem* for the preservation of legacies does not interrupt the possession of one usucapting as heir, because he holds the thing only for safekeeping. What, then, is the position? Even if usucapion be completed, such person will still retain his lien, so that he will not withdraw unless the legacy has been made over to him or he has been given security in respect of it. 1. The commonly stated general proposition that no one can change the ground of his own possession must be interpreted to cover not only legal possession but also factual possession. Accordingly, it has been ruled that a tenant, depositee, or borrower cannot, for his own benefit, usucapt as heir. 2. Then, Servius says that a son cannot usucapt as heir a gift made to him by his head of household, doubtless because he was of opinion that the son had factual possession of it while the father was alive. It follows that a son instituted heir by his father cannot usucapt things, part of the inheritance, which were given to him by his father, so far as co-heirs' shares are concerned.

3 POMPONIUS, *Quintus Mucius, book 23:* There were many who thought that if I am heir and believe something to be part of the inheritance when it is not, I can usucapt it.

4 PAUL, *Lex Julia et Papia, book 5:* It is settled that one who has *testamenti factio* [as heir] can usucapt as heir.

6

USUCAPION ON THE GROUND OF GIFT

2 PAUL, *Edict, book 54:* A person usucapts on the ground of gift to whom the thing was delivered by way of gift; it is not enough that he should think that there has been a gift; there must in fact be a gift. 1. If a head of household gives something to his son-

in-power and then dies, the son will not usucapt the thing on the ground of gift because gift there was none. 2. If a gift be made between husband and wife, no usucapion follows. Similarly, Cassius held that if a husband should make a gift to his wife and then divorce follows, there will be no usucapion because she cannot herself change the ground of her possession; but, he says, after the divorce, if the man leaves the thing with his ex-wife, she will usucapt as though the gift was made at that time. Still Julian thinks that a wife possesses what is given to her by her husband.

2 MARCELLUS, *Digest, book 22:* If a man who has made a gift of something decides to revoke it, usucapion will run for the donee, even though the donor institutes proceedings and raises a *vindicatio* to recover the thing.

3 POMPONIUS, *Quintus Mucius, book 24:* Suppose that a husband makes a gift to his wife or a wife to her husband; if the thing given belongs to someone else, the view of Trebatius is correct, that is to say, that so long as the donor is not made poorer by the gift, usucapion will run for the possessor.

4 POMPONIUS, *Sabinus, book 32:* A head of household makes a gift to his daughter-in-power and then disinherits her; if his heir ratifies the gift, she will usucapt it as from the date of the heir's ratification.

5 SCAEVOLA, *Replies, book 5:* A man who had begun to usucapt a slave on the ground of gift achieved nothing by purporting to manumit him, because he had not yet acquired ownership of him; the question asked was whether he ceased to usucapt the slave. I replied that the man in question appeared to have abandoned possession, and so his usucapion was broken.

6 HERMOGENIAN, *Epitome of Law, book 2:* Where a sale is made to mask a gift, the thing, when delivered, will be usucapted on the ground of gift not that of purchase.

7

USUCAPION ON THE GROUND OF ABANDONMENT

1 ULPIAN, *Edict, book 12:* If a thing be treated as abandoned, it ceases forthwith to be ours and will at once belong to the first taker because things cease to be ours by the same means by which they are acquired.

2 PAUL, *Edict, book 54:* If we know that the owner regards a thing as abandoned, we can acquire it. 1. Now Proculus says that such a thing does not cease to be the owner's until it is possessed by another; but Julian says that it no longer belongs to the abandoner but will become another's only when taken into possession; and that is correct.

3 MODESTINUS, *Distinctions, book 6:* A common question is whether a thing can be deemed abandoned in part. And indeed, if one co-owner should abandon his share in a thing owned in common, it ceases to be his for what one can do with the whole, one can do with a part. But the owner of a whole cannot bring it about that he retains one part while abandoning another.

4 PAUL, *Sabinus, book 15:* We can usucapt what has been believed to be abandoned and what we so believe, even though we do not know by whom it has been abandoned.

5 POMPONIUS, *Sabinus, book 32:* Suppose that you are possessing something as having been abandoned, and I, knowing that to be the case, buy it from you; it is settled law that I will usucapt it, and it is no obstacle thereto that the thing is not part of your assets; for the law would be the same if I bought from you a thing given to you by your wife, because you made the sale, as it were, by the will and consent of the owner. 1. What someone has abandoned becomes mine immediately; just as, when someone scatters largesse or releases birds, although he does not know the person whom he

wishes to have them, they yet become the property of the person to whom chance takes them, so a person who abandons something is deemed to wish it to become the property of another.

6 JULIAN, *Urseius Ferox, book 3:* No one can usucapt on the ground of abandonment who erroneously thinks the thing to be abandoned.

7 JULIAN, *From Minicius, book 2:* If someone finds goods jettisoned from a ship, the question arises whether he is unable to usucapt them because they are not regarded as abandoned. The more correct view is that he cannot usucapt them on the ground of abandonment.

8 PAUL, *Replies, book 18:* Sempronius sought to raise an issue over the status of Thetis as having been born of his slave-woman. Confronted, before witnesses, by Procula, the foster mother of Thetis, in proceedings for the payment of maintenance, he replied that he had not the means to pay for the maintenance of Thetis and that she should be returned to her father, Lucius Titius; and Procula made a written record that she would, thereafter, not endure any proceedings by the said Sempronius and that Lucius Titius, having paid Seia Procula for the girl's maintenance, manumitted Thetis before the magistrate. My question is whether Thetis's freedom can be rescinded. Paul replied: Since the owner of the slave-woman to whom Thetis was born appears to have abandoned Thetis, she could properly be raised to a state of liberty by Lucius Titius.

8

USUCAPION ON THE GROUND OF LEGACY

1 ULPIAN, *Disputations, book 6:* A person to whom a thing is bequeathed is held to possess it by way of legacy; possession and usucapion on the ground of legacy are open to no one other than the legatee.

2 PAUL, *Edict, book 54:* If I possess a thing in the belief that it has been bequeathed to me, when it has not, I do not usucapt it on the ground of legacy,

3 PAPINIAN, *Questions, book 23:* any more than one thinking that he has bought a thing which he has not bought.

4 PAUL, *Edict, book 54:* A thing can be usucapted on the ground of legacy, whether it be the testator's own or that of someone else, if it has been bequeathed but it is not known that it has been adeemed in codicils. For in their case, there is a lawful ground which suffices for usucapion. The same may be said, if there be uncertainty of identity, as when a legacy is left to Titius, when there are two Titii and each believes that he is the intended beneficiary.

5 JAVOLENUS, *From Cassius, book 7:* A thing delivered as a legacy nonetheless will be usucapted on the ground of legacy, even though the owner of it is alive,

6 POMPONIUS, *Sabinus, book 32:* if the recipient believes it the property of a dead person.

7 JAVOLENUS, *From Cassius, book 7:* No one can usucapt on the ground of legacy save one who has *testamenti factio* [as legatee], because such possession stems from the law of wills.

8 PAPINIAN, *Questions, book 23:* If the legatee acquires without flaw possession which is not delivered to him, usucapion of the thing bequeathed will run.

9 HERMOGENIAN, *Epitome of Law, book 5:* A man usucapts on the ground of legacy to whom a thing has been lawfully bequeathed; but, after much vacillation, it has been accepted that even if the legacy is irregular or has been adeemed, the thing can be usucapted on the ground of legacy.

9

USUCAPION ON THE GROUND OF DOWRY

1 ULPIAN, *Sabinus, book 31:* A most fitting title to usucapion is that styled "on the ground of dowry" whereby one who receives a thing by way of dowry can usucapt over the fixed period over which men usucapt as purchasers. 1. It matters not whether individual things or a collectivity of them be given in dowry. 2. Now we will first consider the time from which a person may usucapt on the ground of dowry after the marriage or even before it takes place. A common question is whether a fiancé (that is, one not yet married) can usucapt a thing on the ground of dowry. Julian says that if the future bride delivers a thing to her fiancé with the intention that it shall not become his until the nuptials follow, usucapion will not begin; and if it be not clear what was intended, says Julian, it should be held that the intention was that the things should become the man's forthwith so that, if they belong to a third party, they can be usucapted; this to me is the more plausible view. But before the marriage, he will usucapt as his own not on the ground of dowry. 3. While the marriage subsists, there will be usucapion on the ground of dowry between the married parties; if, though, the marriage ends, Cassius says that usucapion will cease because there is now no dowry. 4. The same jurist writes that, equally, if a man thought himself married, when there was in fact no marriage, he could not usucapt because there would be no dowry. There is reason in this view.

2 PAUL, *Edict, book 54:* If a thing be delivered at a valuation before the marriage, it is, until the marriage, not usucapted either on the ground of purchase or on that of dowry.

3 SCAEVOLA, *Digest, book 25:* Two daughters were the heiresses of their intestate father, and they gave in dowry slaves whom they owned in common; then, some years after the father's death, an action was brought between the daughters to divide the inheritance. The question was whether their husbands, having possessed for several years as dotal the slaves whom they received in good faith, could be seen to have usucapted them, assuming that on receipt of them, they believed that they were the property of the wife delivering them. The reply was that nothing had been advanced to show why they should not have usucapted.

10

USUCAPION FOR ONESELF

1 ULPIAN, *Edict, book 15:* This is the nature of possession for oneself; when we believe that we have acquired ownership of a thing, we possess it both on the ground of acquisition and for ourselves; for instance, on the ground of purchase, I possess both as purchaser and for myself, and similarly, I possess a thing given or bequeathed to me both on the ground of gift or legacy and for myself. 1. But if a thing be delivered to me on a lawful ground, say purchase and I usucapt it, I begin to possess it for myself even before usucapion. Whether, after usucapion, I cease to do so as purchaser is a matter of uncertainty; Maurician is reported as holding that I do not.

2 PAUL, *Edict, book 54:* There is a type of possession styled "for oneself." By this title, we possess all that we catch by land, sea, or in the air, and what becomes ours through the alluvion of rivers. Similarly, we possess by this title the offspring which we possess of another's property, for instance, the child of an inherited or purchased slave-woman, so also the produce of a thing bought or received by way of gift, or which is found in an inheritance.

3 POMPONIUS, *Sabinus, book 22:* You delivered to me a slave whom, erroneously, you thought that you owed me on a stipulation; if I know that nothing is due to me, I will

not usucapt him; but if I do not know, the more correct view is that I do usucapt him, because the very delivery, on a ground which I believe to be true, suffices to bring about the result that I possess for myself what is delivered to me. This was the recorded view of Neratius and I think it to be correct.

4 POMPONIUS, *Sabinus, book 32:* Trebatius says generally that if you bought a stolen slave-woman in good faith, you so possessed the child conceived by and born to her while she was with you that though you learned, within the period laid down for usucapion, that the mother was stolen, what was so possessed would be usucapted. For myself, I think that the following distinction should be taken; if, within the statutory period, you do not know whose slave she was, or if, though you know, you could not inform the owner, or if you both could and did inform the owner, you usucapt the child; but should you know and be able to, but not inform the owner, the contrary would hold good; for, then, you would be regarded as possessing by stealth, and the same person cannot be held to possess both for himself and by stealth. 1. Suppose a head of household to have divided out with his sons the assets which he has, and on that account, the sons hold the property after the father's death, because they agree to ratify the division; usucapion for himself will run for each in respect of any third person's goods which are found in the father's estate. 2. A thing, in fact not bequeathed, is wrongly delivered by the heir; it is the general view that it can be usucapted by the "legatee" because he possesses it for himself.

5 NERATIUS, *Parchments, book 5:* The usucapion of things, though sometimes granted on other grounds on the basis of which we think that we are possessing what is ours, was established so that there might be an end to litigation. 1. But a man may usucapt a thing which he believes to be his, although his belief is unfounded. This, however, is to be understood in the sense that a reasonable and plausible error will not prevent the usucapion of a possessor, for instance, if I possess a thing because erroneously I think that my slave or the person in whose shoes I stand through the law of succession bought it; for an error is excusable where the act of a third person is concerned.

BOOK FORTY-TWO

1

JUDGMENT AND THE EFFECT OF JUDICIAL DECISIONS AND INTERLOCUTORY PROCEEDINGS

1 MODESTINUS, *Encyclopaedia, book 7:* An issue is said to be determined when an end is put to the dispute by the pronouncement of the judge, which can be either a condemnation or an absolution.

2 ULPIAN, *Edict, book 6:* One sitting in judgment does not always observe the usual period of trial, but sometimes abridges proceedings and sometimes adjourns proceedings by reason of the nature and magnitude of the issue or the submission or obstinacy of the parties. Very rarely, judgments are executed before the statutory period, for instance, when maintenance is awarded or relief given to a *minor* under twenty-five years of age.

3 PAUL, *Edict, book 17:* He who has the power to condemn has also the power to absolve.

4 ULPIAN, *Edict, book 58:* If a procurator does not present himself, the action to enforce a judgment will be refused against him and granted against his principal; if he does appear, the action is given against him. A person is not regarded as appearing in a suit who is a procurator in his own interest; such a one cannot object to the action to enforce judgment for another reason, that is to say, that he is a procurator not on behalf of another, but on his own behalf. 1. A tutor or curator again is in such case that he is not treated as appearing as a representative, and so the action to enforce a judgment should be refused against him. 2. The representative of the citizens of a municipality can refuse to accept the decision; for the action to enforce the judgment will be given against the citizens as such. 3. The praetor says: "condemned to pay money"; an unsuccessful defendant, therefore, is required to pay money. Now what are we to say if he is not prepared to pay, but is prepared to give security for payment? Labeo says that the following words should have been added: "and does not give security therefor"; for it could well be that the defendant has an acceptable surety. The reason for the requirement of money is that the praetor does not wish obligations to be created out of obligations and so he says: "that money be paid." But where there is good and appropriate cause, the rider suggested by Labeo should be added. 4. If, after the decision, an agreement is made between the parties, it can happen that the party against whom the decision went will be relieved of his liability to pay, provided that the agreement be by way of novation; if it be not by way of novation, execution of the judgment will follow its normal course. If pledges or verbal guarantors be accepted in respect of the issue decided, it cannot be said that execution does not follow; for an addition is made to the decision rather than a resiling from it. The same applies to one whose procurator is condemned. 5. If someone be condemned to make payment by a given date, do we compute the period of availability of the action to enforce the

judgment from the time that judgment is given or rather from the expiry of the appointed time? Should the judge stipulate a time less than the legal period for payment, it will be augmented to the full period which the statute allows; but, if the judge incorporate a longer period in his ruling, the judgment debtor will have the benefit of the statutory period plus the additional time that the judge prescribes. 6. When we speak of a person condemned, we mean someone condemned in proper form, so that the decision is valid; if, for whatever reason, the judgment be of no consequence, it cannot be said that the term "condemnation" is applicable. 7. We regard as discharging his liability not only one who pays the damages but also anyone who, in any way, is released from the obligation deriving from the judgment against him. 8. Celsus writes that if a person condemned in a noxal action surrender the slave but someone else has a usufruct in that slave, you can proceed against the person condemned by the action to enforce a judgment; but, he says, if the usufruct is terminated, the person is released from liability.

5 ULPIAN, *Edict, book 59:* The praetor says: "he who has jurisdiction in that matter." he would have done better to write: "he who is charged to investigate the matter"; the term "investigation" is applicable to those who do not have jurisdiction, but who, on some other ground, are to conduct an inquiry. 1. If a judge condemn someone to hand over to Titius what he receives under the will or codicils of Maevius, this is to be interpreted as though the judge specified the amount left under the will or codicils. The same applies also if the *fideicommissum* were declared orally.

6 ULPIAN, *Edict, book 66:* If a soldier, having received his military earnings, be condemned to the extent that he can afford, he will be obliged to pay. 1. Should someone be condemned to pay ten or noxally to surrender the slave, he is liable, in the action to enforce the judgment, for the ten; for he has the statutory alternative of noxal surrender. But one who stipulates for ten or for the slave's noxal surrender cannot sue for the ten, because, in a stipulation, those things are independent for which we could make separate stipulations. There is, though, no action for noxal surrender alone; it ensues upon a condemnation for money. Hence, if the action be brought only for the ten, it is only for them that he will be condemned; the possibility of noxal surrender is a means of discharging one's liability afforded by statute. 2. One who, on his own authority, sells goods, the object of a judgment, is liable to the action for theft and that for goods taken by force. 3. The action to enforce a judgment is perpetual and lies to recover the award. Likewise, it is available to and against heirs.

7 GAIUS, *Urban Praetor's Edict, Chapter on Determination of the Issue, book . . .:* Although no action to enforce the judgment can be brought within the specified period, there is no doubt that nowadays there are many ways in which the person condemned can be released from his liability because the specified period was ordained by statute for the benefit of such person, not against him.

8 PAUL, *Plautius, book 5:* The law is that if a person claimed by a stipulation should die after issue has been joined, there is to be no absolution, and any fruits concerned are also to be taken into account.

9 POMPONIUS, *From Plautius, book 5:* A judge or abitrator cannot pronounce judgment against a lunatic.

10 MARCELLUS, *Digest, book 2:* A son-in-power, who pretends that he is a head of household and thereby obtains a loan for consumption and who is disinherited or emancipated by his father, is to be condemned although he has no means.

11 CELSUS, *Digest, book 5:* If I stipulate that something be done on the first of a month, it is certainly the case that on my bringing proceedings after the first has passed, the assessment of my damages is to be based on what it meant to me that it should be done on the first; for assessment should be made as from the last moment when performance could be made.

12 MARCELLUS, *Digest, book 4:* Where the action on a deposit or a loan for use be brought, then, even though the thing be missing through the fraud of the defendant, on condemnation, he should receive the relief that the owner make over to him his own actions.

13 CELSUS, *Digest, book 6:* If a man stipulate from one person that he give ten and from another that he give security therefor, the stipulator's interest in the security will be a matter for assessment; it could be the full amount or less or nothing; for no assessment will be made on the ground of a baseless apprehension. Now if the sum be paid, there will be a nil assessment, or if some of the amount be paid, it will be deducted from the assessment of the security. 1. If someone should promise that he will prevent the stipulator from suffering any harm and he so acts that no harm does arise out of the matter, he performs his promise; if not, since he has not done what he said he would, he is to be condemned in money damages just as would be the case in any other action on a stipulation to do something.

14 CELSUS, *Digest, book 25:* What a praetor directs or bans can be waived or allowed by a counter *imperium*; this is not the case with judicial decisions.

15 ULPIAN, *Duties of Consul, book 3:* In a rescript, the deified Pius directed the magistrates of the Roman people that those who appointed judges or abitrators should execute their decisions. 1. Our emperor with his father issued a rescript that governors, if so directed, should be able to execute in the provinces a judgment delivered at Rome. 2. They direct that when a sale is being made of pledges which have been taken, movables and animals should first be taken and then sold. If the price that they raise is enough to satisfy the judgment, all is well. If it is not, then they direct land pledges also to be seized and sold. Where there are no movables, a start is made forthwith with land securities. Hence, their practice is to direct that land be seized when there are no movables; for normally one does not begin by selling land pledges. If what the land raises be inadequate or if there be no land securities, then they turn to the judgment debtor's rights. This is the way in which governors execute a judgment. 3. Our emperor and his deified father ruled in a rescript that if there be no purchaser for the pledges which are taken, the things are to be assigned to the successful plaintiff, but they are so assigned as meeting what is due to him. For if the judgment creditor prefers to possess the pledges and is content therewith, a rescript states that he cannot claim anything further, beyond their value, which is due to him. One who is satisfied to hold the securities is regarded rather as having made a *transactio* on his claim and he cannot hold them as representing a certain amount and sue for the balance. 4. If there be a dispute over the title to things seized by way of pledge, our emperor has ruled in a rescript that those executing the judgment are to investigate the question of who owns them; if they satisfy themselves that the things belong to the judgment debtor, they proceed with the execution of the judgment. It must, though, be known that they should make a brief investigation, and should they be of opinion that the thing be put aside as belonging to the person claiming it and not to the judgment debtor, their decision cannot prejudice the debtor; and the person to whom it is awarded does not hold it forthwith by virtue of their decision, if an ordinary action for its recovery be brought against him. Thus, it falls out that execution normally proceeds by seizure. But it must be stated that if there be a dispute over the title to a pledge, that thing should not be taken, but rather something else over which there is no dispute. 5. If the thing seized be already in pledge, we have to consider whether it can be sold so that after the pledge creditor has been satisfied, the balance can go toward the execution of the judgment. Now although a creditor is not required to sell a thing which he holds in pledge, nevertheless, the rule in respect of the execution of judgments is that if a purchaser be found for the thing seized, who is ready to pay the

balance after satisfying the creditor, sale of the thing is permitted. The creditor's position is not regarded as adversely affected since he gets what is due to him and he does not lose his right in the pledge until he has been paid off. 6. A matter for consideration is whether, if a dispute over title is raised with the purchaser after the thing seized has been assigned to him, the matter is to be adjudicated upon by the same judge who executed the judgment. Since risk passes to the purchaser once a sale is perfect, I think that there is no scope for an inquiry; surely, once the purchaser has been put in possession, judges have discharged their function. The same applies if the thing be assigned to the successful plaintiff. 7. Now if the purchaser to whom the goods seized are assigned by the judges executing the judgment should not pay the price, should these same judges take action against such purchaser? I think that they should proceed no further; the matter will be well out of their hands. What, then, are we to say? Are they to pronounce judgment against the purchaser and execute it or to regard him as already condemned? What, again, if he should deny that he bought it or allege that he has paid the price? Therefore, it is better that they should not interfere, especially since the plaintiff, the satisfaction of whose judgment they are seeking to realize, has no action against the purchaser. There is nothing wrong in this; for goods seized and sold should be sold for ready cash and not on the basis that payment be made at a later date. However, if they do interfere, they should limit their intervention to seizing and selling the thing assigned as if it had not ceased to be the object of an obligation. 8. If there be nothing else to seize, the judges, by way of execution, seize debts due to the person condemned; for our emperor, in a rescript, has stated that this is permissible. 9. Let us consider, however, whether only an admitted debt can be so seized or also one which the alleged debtor denies to exist. The better view is that only such debt may be seized as is admitted to exist. If the debt be denied, the most appropriate course is that it should be abstained from unless someone, following the precedent of corporeal pledges, goes further and says that the judges themselves should investigate to whom the debt is due as they do over questions of ownership. There is, however, a rescript to the contrary effect. 10. What do we say? Are the judges to appropriate the debt and demand what is due to apply it to satisfaction of the judgment, or do they sell the debt as they would sell corporeal things which they seize? It must be said that they should adopt the course which, they think, would more easily achieve their object. 11. And the money can equally be seized when it is in the hands of bankers; even more so, if it be in the hands of some person but intended for the judgment debtor, the money can be seized and appropriated to satisfaction of the judgment. 12. The judges further appropriate for this purpose money deposited in the debtor's name or contained in a chest. This applies the more so if the money of a *pupillus* be kept in a chest for the acquisition of land; even without the praetor's permission, it can be seized and used to satisfy a judgment.

16 ULPIAN, *Edict, book 63:* There are people who are sued for what they can afford, that is, not taking account of what others owe them. These are mainly those sued in the action on partnership (which means a partnership of all assets); likewise a parent,

17 ULPIAN, *Edict, book 10:* a patron, patroness, or their children and parents. Equally, a husband is sued in respect of dowry for what he can afford.

18 ULPIAN, *Edict, book 66:* And in the same way, a soldier receiving his military pay, being condemned to pay what he can afford is obliged to make such satisfaction.

19 PAUL, *Plautius, book 6:* Between those to whom a debt is due on the same ground, the person who takes the initiative has the advantage, and no deduction is made in respect of what is due to persons in the same parental power as happens in the action on the *peculium*. For, even here, the position of the one who takes the initiative is stronger. Even if the proceedings be with a head of household or patron, there is no

deduction of extraneous debts and especially not debts due to such persons as sons-in-power and freedmen. 1. Again, one sued in respect of a gift is condemned for what he can afford, and in his case alone such deduction is made. Then, where something is due to more than one on the same ground, the person who takes the initiative has the advantage. But I think that he cannot take everything which the debtor has; care must be taken that the debtor is not left destitute.

20 MODESTINUS, *Distinctions, book 2:* By a ruling of the deified Pius, a husband is condemned for what he can afford not only in respect of dowry but also when sued by his wife in respect of other transactions. Considerations of equity suggest that to keep the balance right, the same should apply to a wife sued by her husband.

21 PAUL, *Plautius, book 6:* Just as in actions against a husband, so also in those against a father-in-law, judgment should be for what he can afford. Does the same hold good if he be sued on a promise of dowry? This would, indeed, seem fair but, as Neratius writes, our rule is in fact different.

22 POMPONIUS, *Quintus Mucius, book 21:* This, however, must be taken to apply to a case where the father-in-law is sued on his promise of dowry after the marriage has ended. If the dowry be claimed from him while the marriage is still in existence, he is to have the relief that he be condemned for no more than he can afford. 1. When it is said of partners that they will be condemned only for what they can afford, the praetor has proclaimed that he will so provide after investigating the case. The object of such investigation is to ensure that no relief be granted to one who asserts that he is not a partner or who is liable under the rubric on fraud.

23 PAUL, *Plautius, book 6:* Suppose that an action be fought with a husband's procurator in respect of dowry; should judgment against him be given while the husband is still alive, he will be condemned for what he [the husband] can afford (for the champion of a husband also is entitled to this concession), but if the husband has died, judgment will be for the full amount due.

24 POMPONIUS, *From Plautius, book 4:* If a verbal guarantor be accepted in respect of a defendant or action, it does not avail him that the actual defendant would be condemned only for what he can afford. 1. Again, if a husband be insolvent, although it is a relief to the husband (that is, the husband personally) that he can afford nothing, this concession is not granted to his heir.

25 PAUL, *Edict, book 60:* It must be known that the heirs of these persons are liable in full, not merely for what they can afford.

26 ULPIAN, *Edict, book 77:* If litigants agree what the decision should be, it will not be out of order for the judge to deliver judgment accordingly.

27 MODESTINUS, *Replies, book 1:* Contrary to statutes and imperial rulings, the governor of a province ordered the payment of interest on interest, and on that ground, Lucius Titius appealed against the unjust decision; my question is: Can the money be demanded under the judgment, since Titius did not make his appeal in accordance with statute? Modestinus replied that if a specific amount was mentioned in the judgment, no objection can be raised to the bringing of the action to enforce the judgment.

28 MODESTINUS, *Replies, book 12:* Two appointed judges gave different decisions. Modestinus replied that each is in suspense until a competent judge confirms one of them.

29 MODESTINUS, *Encyclopaedia, book 7:* The time granted for satisfaction of a judgment (more accurately, what remains of it) is available also to heirs and other successors of the judgment debtor; for it is provided for the benefit of the cause rather than of the person.

30 POMPONIUS, *Readings, book 7:* When money is promised by way of gift and there is a question whether the sum would exhaust the funds of the donor so that he would be left with virtually nothing, an action for what he can afford should issue so that the donor himself is left with a competence. This is to be observed especially between children and parents.

31 CALLISTRATUS, *Judicial Examinations, book 2:* Where debtors so petition, they are to be given time for payment, and the period may be deferred, if the circumstances require it. But if they defer payment through obstinacy rather than because they are unable to raise the money, their goods will be seized, and they will be compelled to make satisfaction in the manner set out by the deified Pius in this rescript to the proconsul, Cassius: "Those who admit a debt or who are required to make payment under a judgment are to be given time for payment, the period being adjusted according to the circumstances of the individual. If they do not pay within the period given at the time or that, for some reason, deferred, goods of theirs are to be seized and, if payment is not forthcoming within two months, sold. If there be any surplus after the sale, it is to be given to him whose goods were sold."

32 CALLISTRATUS, *Judicial Examinations, book 3:* When there are imperial rulings published and a judge makes a decision running counter to them, because he does not consider that they are relevant to the issue before him, he is not regarded as having delivered judgment in contravention of those rulings. An appeal may be made against such a decision, but if no appeal is made, the action to enforce the judgment will issue.

33 CALLISTRATUS, *Judicial Examinations, book 5:* The deified Hadrian received a written complaint from Julius Tarentinus who alleged that the judge in his case had been deceived by false evidence through a conspiracy of his opponents, who had bribed the witnesses, and asked that he be granted *restitutio in integrum.* The emperor issued the following rescript: "I have directed that there be forwarded to you a copy of the complaint which I have received from Julius Tarentinus. If you establish that he has fared badly through the conspiracy of his opponents and their bribing of witnesses, you are to deal severely with them and, if the judge made any ruling through being misled by this base conduct, you will grant the suppliant *restitutio in integrum.*"

34 LICINNIUS RUFINUS, *Rules, book 13:* If someone refuse to be brought to a judgment-debtor food and a bed, a penal *actio utilis* will be granted against him or, in the view of some, the action for insult.

35 PAPIRIUS JUSTUS, *Imperial Rulings, book 2:* The Emperors Antoninus and Verus ruled in a rescript that although transactions should in no way be reopened on the production of new documents, nevertheless, on public business, such documents may be admitted on cause shown.

36 PAUL, *Edict, book 17:* In the thirty-seventh book of his work on the *Edict,* Pomponius says that in a case concerning a person's freedom, if one of several judges trying the case be unable to come to a decision while the others are all of one opinion, then, on that judge's swearing that he cannot come to a decision and remaining silent, the others will pronounce their decision because, despite his dissent, the view of the majority prevails.

37 MARCELLUS, *Digest, book 3:* The judges as a whole are deemed to deliver judgment, when they are all present.

38 PAUL, *Edict, book 17:* Where the judges in a case are equally divided in their opinions, the deified Pius provides that if the issue be one of freedom, those in favor of freedom shall prevail; in other cases, the defendant is to be absolved. And this ought also to apply in public prosecutions. 1. Julian writes that if judges condemn for varying amounts, it is the smallest sum which is payable.

39 CELSUS, *Digest, book 3:* Where there are three judges, it is not permissible for two to give judgment in the absence of the third; after all, they were all charged to give judgment. But if he be present and give a dissenting judgment, the opinions of the other two prevail; for it is surely true that all of them have delivered judgment.

40 PAPINIAN, *Replies, book 10:* It is accepted that where the judgment-debtor has been awarded the rewards given to those successful in public games or competitions, he will be interdicted from taking them and the money will be seized for the purpose of satisfying the judgment.

41 PAUL, *Questions, book 14:* Nesennius Apollinaris asks: Will you be liable to proceedings for the whole of what I owe, if, when you wish to make me a gift, I ask you to make it over to my creditor; and if the answer be affirmative, would your opinion be different if, instead, I ask you to make it over not to my creditor but to one to whom I myself wish to make a gift; and what would you say of one who promises a dowry to the husband of a woman to whom he wishes to make a gift? The answer is that there is no defense valid against the actual creditor although there will be one for the person delegated against the person on whose behalf he promises; the husband is in like case, especially if he bring proceedings while the marriage is still subsisting. And just as the heir of the donor and any verbal guarantor that he gave in respect of the gift are to be condemned for the full amount due, so also is he condemned in full to one to whom he does make over a gift. 1. A man makes a gift of land; if he does not make it over, he is to be condemned as would be any other possessor thereof; if he does eventually hand over the land, he is to be condemned in full in respect of unconsumed fruits thereof; for he could have avoided putting himself at risk by giving possession forthwith. If, through fraud, he cease to possess the land, after a processual oath on the value, he will be condemned for that amount. 2. A donor will be liable for the full amount in the action to enforce the judgment, unless, through the relief of some imperial ruling, he is to be condemned for what he can afford.

42 PAUL, *Replies, book 3:* Paul replied that the praetor cannot rescind a decision that he has already given but that he must provide for ancillary issues arising from what he has already decided, whether they pertain to condemnation or to an absolution, provided that he do it on the day of the original judgment.

43 PAUL, *Replies, book 16:* Paul replied that where several persons are condemned in a single judgment for one overall sum, each is liable, in respect thereof, for his appropriate share. Hence, if, when judgment is delivered against three defendants, Titius should pay the share due from him, he cannot be sued in respect of the others included in the same decision.

44 SCAEVOLA, *Replies, book 5:* Suppose that an action be brought against a *pupilla*, whose tutor gives *auctoritas*, in respect of a contract made by her father, and that she is condemned; subsequently, the tutors decline the father's inheritance on her behalf so that it goes to a substitute heir or to her co-heirs; the question is: Are these persons liable in full for the execution of the judgment? The reply is that they are, unless it was through the fault of her tutors that the *pupilla* was condemned.

45 PAUL, *Views, book 1:* If the parties agree and the judge permit it, he can direct the record of proceedings between them to be circulated that day unless the relevant transaction or legal dispute be at an end. 1. Without imperial authority, there is no provision for increasing or reducing an award after judgment has been delivered. 2. No decision is to be made against undefended *minores* who have neither a tutor nor a curator.

46 HERMOGENIAN, *Epitome of Law, book 2:* There is no ban on altering the wording of the record, so long as the tenor of the decision be preserved.

47 PAUL, *Views, book 5:* Judgment in respect of one comprehensive transaction should be made only with all the interested parties present; otherwise, the judgment is binding only between those in fact present. 1. Those who, though repeatedly summoned, neglect to defend their case before the imperial treasury are to receive the same treatment as judgment-debtors. This is seen to be the case when, despite frequent summonses, they decline to enter an appearance.

48 TRYPHONINUS, *Disputations, book 2:* Decrees of the praetor are to be issued in Latin.

49 PAUL, *Handbook, book 2:* A person disinherited or who declines his father's inheritance is not to be condemned on his contracts for more than he can afford. We must

consider how he is to be assessed in terms of what he can afford with the deduction of all other moneys due, as in the case of one sued in respect of gift, or without such deduction as in the case of a husband or patron. It is undoubted law that he should be treated like the husband and the patron; for it is more meritorious that we should afford relief to one making a gift than to one constrained to pay an actual debt,

50 TRYPHONINUS, *Disputations, book 12:* so that he be not put in jeopardy of poverty through his own liberality.

51 PAUL, *Handbook, book 2:* If someone fraudulently contrive that his assets be sold on bankruptcy, he will be liable in full. 1. If a man does not admit a creditor granted *missio in possessionem* to preserve the assets, but the vendor thereof makes satisfaction to the creditor, it has been asked whether the debtor is thereby released from his liability. My opinion is that the creditor would act disgracefully if he seek to get again what he has already received.

52 TRYPHONINUS, *Disputations, book 12:* If a husband be sued by his wife for the abstraction of her property, then, although the ground of the action lies, it would appear, in the erstwhile community of their life together, he should be condemned in full for the action arises from his wrongdoing and delict.

53 HERMOGENIAN, *Epitome of Law, book 1:* The contumacy of those who do not obey the person with jurisdiction is punished by the loss of their suit. 1. A person is contumacious who, when three edicts are issued or one in lieu of three, which is called peremptory, and he has been summoned in writing, does not deign to enter an appearance. 2. The penalty for contumacy does not fall on those in ill health or who plead pressing and important business. 3. People are not deemed contumacious unless they refuse to comply when they should do so, that is, when they fall within the jurisdiction of him whom they refuse to obey.

54 PAUL, *Views, book 1:* A peremptory order against an undefended *pupillus*, one absent on state business, or a *minor* under twenty-five years of age has no effect. 1. If a person, on being summoned to a higher tribunal, abandons a suit which he has begun, he is not regarded as contumacious.

55 ULPIAN, *Sabinus, book 51:* Once a judge has delivered his judgment, he then ceases to be a judge. The law which we observe is that once he has made an award, whether for a large or for a small sum, a judge cannot subsequently amend his decision; for whether he has decided badly or well, he has discharged his office.

56 ULPIAN, *Edict, book 27:* Following the pronouncement of the deified Marcus, after an issue has been adjudicated upon or resolved by oath or the defendant has admitted liability before the magistrate, there will be no further inquiry; for those who admit their liability are treated as if judgment had gone against them.

57 ULPIAN, *Disputations, book 2:* Someone sought advice on the question whether a decision given by a judge under the age of twenty-five has any validity. It is most proper that such decision should be honored, unless the judge be under eighteen. Certainly, if a *minor* holds a magistracy, his jurisdiction will be respected. And if a *minor* should be appointed judge by agreement, the parties knowing his age, it is most properly to be said that his decision is binding on those who agreed to him. Thus, if a *minor* who is praetor or consul exercise jurisdiction or pronounce a decision, it will have validity; for the emperor who made him a magistrate endowed him with full authority.

58 ULPIAN, *Disputations, book 7:* If goods be seized as pledges and sold without any prior judgment having been delivered, they can be reclaimed.

59 ULPIAN, *All Seats of Judgment, book 4:* All in all, it is enough that the judge should state a sum in his decision and direct that it be paid or guaranteed or indicate the same by some other form of words. 1. Furthermore, it has been declared in a rescript that although no figure is mentioned in the judgment, but the plaintiff has named a sum and the judge says, "pay what is claimed," or "the amount claimed," the decision will be valid. 2. If those who condemn for a particular sum, further pronounce on interest thereon, saying, for instance, "if interest be payable," or "what interest is payable shall be paid," they decide wrongly; for interest should itself be a matter for hearing, and they should make a specific condemnation. 3. If someone be condemned after his death under a peremptory edict, the decision has no efficacy; for the edict loses force with the death of the defendant. And so investigation of the case will be reinstituted, and the decision which appears best be made.

60 JULIAN, *Digest, book 5:* It has been asked whether judgment has been lawfully delivered when one of the litigants takes a fever and departs and the judge delivers his decision in his absence. The reply is that serious illness entails an adjournment, whether the parties and judge wish it or not. An illness which prevents the carrying on of any business is to be treated as serious. Now what could be a greater handicap to a litigant than that unnatural shaking of the body which is called fever? Accordingly, if, at the time of judgment, one of the litigants is suffering from a fever, the issue is deemed not to be adjudicated upon. However, it can be said that there are various kinds of fever; for if someone, otherwise hale and healthy, be slightly feverish or if he have a quartan fever of such long standing that he has become accustomed to carry on generally despite it, it can be said that he is not suffering from a serious illness.

61 JULIAN, *Digest, book 45:* In the action to execute a judgment, no prior account is to be taken of that to which the defendant may have previously been condemned.

62 ALFENUS VARUS, *Digest, Epitomized by Paul, book 6:* The question was asked whether a judge who gave a wrong judgment could deliver another judgment on the same day; the answer was that he cannot.

63 MACER, *Appeals, book 2:* It has been frequently ruled that an issue decided between one set of parties does not prejudice others. A certain distinction, however, must here be taken; for a judgment pronounced between one set of parties will hold good against some others, if they know about it, but there are others again to whom it will do no harm, even though the judgment went contrary to them. For there is no prejudice to those who know, say, when one of the two heirs of a debtor is condemned; the other is completely free to make his own defense although he is aware of the proceedings against his co-heir. Again, if one of two unsuccessful plaintiffs takes no further action, this does not prejudice the appeal of the other; and this has been stated in a rescript. Knowledge of the decision given in a case between others will be an obstacle when a person allows another to bring proceedings in respect of some matter in which he is first entitled to be plaintiff or defendant; suppose, for instance, that a creditor tolerates his debtor's bringing proceedings over the ownership of the pledge, a husband so bearing his father-in-law's or wife's doing likewise over the ownership of property given in the dowry or a possessor allowing the vendor to litigate over the ownership of what he bought. This can be gathered from many imperial rulings. The reason that such persons suffer from their knowledge, while those mentioned previously do not, is this: One who knows that his co-heir is involved in litigation cannot prohibit him from suing or defending, if such be his wish, but one who allows the former owner to conduct the suit, precisely because of his knowledge thereof, will be

barred, on the demurrer of the defendant, although the issue was decided between different parties, because the decision was made by his will in respect of the right which he held through the person taking proceedings. If, for instance, when I intervene in the matter, my freedman be adjudicated a slave or the freedman of someone else, that preempts the issue so far as I am concerned. The case is different if both Titius and I claim land from you, but I state that it does not belong to me through a title derived from Titius. In such a case, although I know that judgment went against Titius, I do not suffer any prejudice because my claim is not on the ground on which Titius was defeated and I was in no position to dissuade Titius from asserting his right, anymore than in the case of the co-heir earlier mentioned.

64 SCAEVOLA, *Digest, book 25:* A person condemned for unauthorized administration appealed, and the issue was protracted. The question was: Is interest due on the sum awarded against him for the intervening period, if the appeal be declared unsuccessful, by reason of the fact that the final decision has been delayed? The reply was that on the assertion put forward, an *actio utilis* will lie.

2

THOSE WHO ADMIT THEIR LIABILITY

1 PAUL, *Edict, book 56:* One who admits liability is in the position of one against whom judgment is pronounced; for, in a way, he is condemned by his own decision.

2 ULPIAN, *Edict, book 58:* A person does not admit liability if he be in error, unless it be an error of law.

3 PAUL, *Plautius, book 9:* Julian says that one admitting liability to hand over a certain legacy is to be condemned, even though the legacy does not exist, and if it has ceased to exist, he is to be condemned for its value; for one admitting liability is regarded as if judgment had been pronounced against him.

4 PAUL, *Plautius, book 15:* If someone sued under the *lex Aquilia* admit that he killed the slave, he will be liable on his admission, even though he did not kill him, if the slave in fact has been killed.

5 ULPIAN, *Edict, book 27:* One who admits that he ought to give Stichus is to be condemned, whether Stichus be already dead or die after issue has been joined.

6 ULPIAN, *All Seats of Judgment, book 5:* One who admits something specific is regarded as having been condemned, but not one who concedes a claim for the nonspecific. 1. If someone admit an unquantified liability or liability for a definite thing, say, "that he ought to give Stichus or land," it should be stressed that he admits the specific thing; so also, where someone admits a specific thing, its precise value should be stated. 2. If I should claim land as mine and you concede the claim, you will be treated as though it had been stated in a judgment that the land belongs to me. Again, when anyone is sued in any other action, civil or praetorian, or proceeded against by interdict, be it exhibitory, restitutory, or prohibitory, and admits liability, it may be said that following the tenor of a pronouncement of the deified Marcus, the praetor should treat him as condemned in respect of all of whatever he has admitted. And so, where in actions time is granted for the restoration of a thing, the same time will be allowed to the person admitting liability, and if he does not deliver it up, an assessment of its value will be made. 3. Now if a person admit his liability in the absence of his opponent, it is a matter for consideration whether he should or should not be treated as if judgment had gone against him because one who swears in respect of workdays due from a freedman is not bound nor one condemned to a person not present. It is certainly sufficient that in such cases, a procurator, tutor, or curator be present. 4. But whether it meet the case that the actual procurator, tutor, or curator make the admission is a matter for consideration. I do not think it sufficient. 5. In respect of a *pupillus*, we require the *auctoritas* of his tutor. 6. We treat the admitting

minor as if he had not made his admission of liability. 7. Those who admit liability have the same time thereafter to make amends as those against whom judgment is delivered.

7 AFRICANUS, *Questions, book 5:* Suppose that a *fideicommissum* be claimed and the heir admit that it is due; the arbitrator appointed for its handing over finds nothing to be due; the question is: Can he absolve the heir? I replied that the reason why nothing is due is relevant. If it be that there is no *fideicommissum*, he should not absolve the heir; but if the reason be that the testator was insolvent or that the heir assert, before the praetor, that all liabilities have been met and the arbitrator is appointed because the dispute and subsequent assessment would be rather difficult, then, by virtue of his office, he should absolve the heir. In the first case discussed, the arbitrator should remit the heir to the praetor for absolution.

8 PAUL, *Sabinus, book 4:* One admitting liability is never to be condemned in respect of something of which it is uncertain, whether it exist or not.

3

SURRENDER TO BANKRUPTCY

1 ULPIAN, *Edict, book 17:* A creditor who makes an advance for the restoration of buildings is given a preferred position in respect of what is due to him.

2 ULPIAN, *Edict, book 21:* In personal actions, those who make subsequent contracts with the provision that moneys arising therefrom shall go to their existing creditors succeed to the position of those creditors.

3 ULPIAN, *Edict, book 58:* One who surrenders to bankruptcy is not deprived of his assets until they be sold; hence, if he be ready to make his defense, they will not be sold.

4 ULPIAN, *Edict, book 59:* If someone surrender to bankruptcy and later make some acquisition, he can be sued only for what he can afford. 1. Sabinus and Cassius were of the opinion that one who surrenders to bankruptcy should in no way be disturbed by other creditors.

5 PAUL, *Edict, book 56:* A person who regrets having surrendered to bankruptcy, by making his defense, can ensure that his assets are not sold.

6 ULPIAN, *Edict, book 64:* If someone who has surrendered to bankruptcy later acquire some modest competence after the sale of his assets, there will be no second sale. Now on what basis do we assess the extent of his acquisition, on the quantity or rather on the quality of it? I think the quantity, provided that we bear in mind that if something was left him out of charity, for instance, by way of monthly or annual sustenance, there should be no renewed sale of his assets on that account; for a man is not to be deprived of his daily bread. The same applies if he be given some usufruct or legacy from which he derives no more than his maintenance.

7 MODESTINUS, *Encyclopaedia, book 2:* Where the goods of a debtor have been sold on bankruptcy, on the request of the creditors, there may be further sales of the assets of the same debtor until the creditors are satisfied, if the debtor subsequently acquire such means that the praetor authorizes such a course.

8 ULPIAN, *Edict, book 26:* A person who surrendered to bankruptcy before he acknowledges his debt is condemned or admits his liability before the praetor, is not to be given a hearing.

9 MARCIAN, *Institutes, book 15:* There can be surrender to bankruptcy not only in but also without legal process. A declaration thereof by messenger or by letter suffices.

4

THE GROUNDS ON WHICH *MISSIO IN POSSESSIONEM* IS GRANTED

1 ULPIAN, *Edict, book 12:* There are virtually three grounds on which people are granted *missio in possessionem*: to preserve the cause, to preserve legacies, and on behalf of an unborn child. For, where no *cautio* is given in respect of threatened damage, there is no general *missio in possessionem*, but only into the thing from which damage is apprehended.

2 ULPIAN, *Edict, book 5:* The praetor says: "I will authorize entry on the assets of one who gives a verbal guarantor for appearance at the trial and then does not enter an appearance and is undefended." 1. A person fails to make an appearance who contrives that his opponent does not have access to him; hence, the praetor will order seizure of the assets of a defendant in hiding. 2. What if he be not in hiding but is absent and is undefended? Should he be treated as not entering appearance? 3. A person can be regarded as making a defense who does not disadvantage his opponent's cause in any way by his absence. 4. The term "defended" is given a wide interpretation so that it is not enough that he enter a defense if he does not persist in it, and equally it will not go against him if, having previously failed to do so, he does now present a defense.

3 ULPIAN, *Edict, book 59:* Julian discusses this question: The father of a *pupillus* owned a thing in common with Titius, and the *pupillus* is unrepresented in the action to divide the common holding, and there is nothing in respect of which judgment should be delivered by reason of the person of the father; should the father's assets be sold or should they be taken into possession for the preservation of the thing? Julian says that if the father has taken any fruits of the thing or caused any deterioration in it, his property is to be sold; but if there be no ground for sale of the father's assets, those of the *pupillus* are to be taken into possession. But Marcellus noted that it is grossly unfair that one who has no dealing with the *pupillus* must await his coming of age. This view carries conviction; hence, when the transaction derives from the person of the father, it is to be said that one does not await the adulthood of the *pupillus*. 1. It can be said that there is a dealing with a *pupillus* when the transaction is effected with his slave; for the *pupillus* can be sued in the action on the *peculium*. Hence, it is to be accepted that the same applies in respect of all transactions for which actions are granted against a *pupillus*. Especially is this so where the slave has appropriated the thing to his master's benefit or acted on his direction or if it be possible to bring the action for a business manager's conduct against the *pupillus*. 2. My view is that even when a transaction is entered into with a tutor on which an action is granted against the *pupillus*, this edict is still operative as though the transaction was with the *pupillus*. 3. If a *pupillus* be heir to someone and, by reason thereof, be liable to discharge legacies, we must consider whether this edict is applicable; and the better view is that, as Marcellus writes, the assets of the ward can be taken into possession, and it is for the election of the creditors of the inheritance to choose their course of action; an *impubes* is regarded as entering into a transaction when he accepts an inheritance.

4 PAUL, *Edict, book 58:* So also one who meddles in it.

5 ULPIAN, *Edict, book 59:* This edict, however, is operative whenever a *pupillus* is undefended by anybody, whether tutor or curator and whether or not the *pupillus* has a tutor. But if there be anyone prepared to defend the *pupillus*, there will be no such possession. 1. It is for the praetor to be satisfied by the plaintiff that a *pupillus* is not defended before he allows possession of the assets of the *pupillus*. Such a demonstration to the praetor is to be made as follows: His tutors are to be summoned before

the praetor to make a defense of the *pupillus*; if he has no tutors, his relatives by blood or marriage or any others who, whether through constraint or out of charity or for any other reason, would be unlikely to see the *pupillus* or *pupilla* undefended [may be summoned]; eligible freedmen, again, may be summoned and required to make a defense of the *pupillus*. If they refuse to defend him or, while not refusing, remain silent, the praetor will grant possession but only for so long as no one makes a defense of the *pupillus*; if someone begin to defend the *pupillus* or *pupilla*, possession of the ward's assets will cease. The same applies in respect of a lunatic. 2. The praetor says: "If a lawful defense be made of the *pupillus* or *pupilla*, who comes to majority, I will direct those in possession of their property to give up their possession." 3. In talking of lawful defense, we must consider whether the person be prepared to be available and defend the action or whether it be enough that he gives satisfaction in respect thereof. This edict is operative not only in respect of those seeking to enter their defense but also in respect of the issue; and "is lawfully defended" comprehends defense in person or by anyone else. But if another individual undertake the defense, security is necessary; I do not think that this is the case if a person undertake his own defense. Hence, if a defense be put forward, the possessor can be deprived of the possession of the assets, the authorizing decree being rescinded.

6 PAUL, *Edict, book 57:* A creditor is normally granted *missio in possessionem* of assets, even though money be promised him under a condition. 1. When the edict says, "when a person's goods be taken into possession by his creditors, they may be sold, unless the person be a *pupillus* or one who is genuinely away on public service," we are to understand that the goods of one deliberately absent may be sold. 2. If someone be taken prisoner of war, his creditors are granted *missio in possessionem* of his assets but on the basis that no immediate sale of those assets is authorized; a curator of the goods is appointed for the interim.

7 ULPIAN, *Edict, book 59:* Fulcinius is of opinion that creditors granted *missio in possessionem* to preserve the cause cannot benefit thereby. 1. The praetor says: "I will direct the possession and sale of the assets of one who lies fraudulently in hiding, if, in the opinion of a good man, his case is not being defended." 2. For this edict to apply, it is not enough that the defendant be in hiding; it is necessary that he be so deliberately; nor does it suffice for possession and sale that though there be fraud, what happens is done without concealment; the defendant must fraudulently lie low. This is a very frequent ground of possession for goods being taken into possession, lying low being a practice. 3. If someone take possession of the goods of another, as though he were in hiding when in fact he is not, and sell them, it has to be said that the sale is of no consequence. 4. We have to consider what is meant by hiding. Hiding is not, as Cicero says, a base concealment of oneself; for a person can lie low for no base reason, as when he fears the cruelty of a tyrant or the force of the enemy or internal disturbances. 5. But one in hiding by way of fraud, although not on account of his creditors, is in such case that even though his creditors be thereby put at a disadvantage, his assets cannot be taken into possession because his lying low is not directed to defrauding his creditors; for when a person goes into hiding, one has to ask: With what intention, to defraud his creditors or for some other reason? 6. What, then, are we to say, if the debtor has two or more grounds for hiding, among them being fraud on his creditors? Can sale of his assets lawfully proceed? I think that if he has several reasons for hiding, one being fraud on his creditors, that goes against him and his assets should be sold. 7. Suppose that his design is to hide from some but not from others; what do we say then? Pomponius most correctly writes that proceedings in respect of the hiding are not available to all, but only to the individual that he seeks to circumvent and defraud by his lying low. But are all entitled to sell his assets by reason of his self-concealment, that is, those from whom he is not hiding even though there is no question, but that he is hiding or only the person from whom he does conceal himself? For there is no doubt that he is in hiding, and that deliberately, even though not from me.

Pomponius thinks that we have to consider whether, even though his self-concealment affects me, only the person from whom he is really hiding can seek sale of the assets on that account. 8. To go into hiding is to lie low for an appreciable period just as to flaunt oneself is to appear openly, frequently. 9. So far does hiding require the intent and design of the person who conceals himself that it is rightly said that a lunatic cannot be subjected to a sale on this score; for a person who does not have control of himself does not go into hiding. 10. Obviously, if no defense be made of a lunatic, a curator is to be appointed for him, or it may be specifically provided that his assets may be sold. Labeo, however, writes that if no curator be found or one to make a defense of the lunatic or if the curator appointed does not defend him, that curator is to be removed from office, and the praetor is to appoint a curator of the assets from among the creditors; but no more of the lunatic's assets are to be sold than be necessary. Labeo says that the same rules apply as when an unborn child is granted *missio in possessionem*. 11. Sometimes, of course, the lunatic's assets are to be sold only after investigation of the matter, as when it be objected that there are other debts and that delay would be to the disadvantage of the creditors; but they are to be sold subject to the proviso that any surplus be made over to the lunatic; for the position and condition of such a person does not greatly diverge from that of a *pupillus*. Taking this line is not indefensible. 12. The same is to be said of the spendthrift and others who enjoy the assistance of curators; for no one can rightly say that these people conceal themselves. 13. It must be appreciated that one can stay in the same city and be in hiding and be in another city and not be in hiding. Let us now consider whether a person, who, being in another city, makes himself accessible and appears there in public, be in hiding. The rule that we now follow is that, whether a person carry on in the same place or elsewhere, if he be avoiding confrontation with his creditors, he is in hiding. And the earlier jurists took the view that a person, though he conduct business in the same public place, can be held to be in hiding if he lurks around pillars and posts; they held also that he can be in hiding against one person but not another. It is settled, though, that he alone from whom the defendant is hiding can sell the latter's assets. 14. If a man who has a conditional liability or a liability as from a given time, go into hiding, his property is not to be sold; for what is the difference between a person who is not a debtor and a debtor who cannot yet be sued? We say the same where he is not a debtor at all and where his opponent has a claim which he can counter with a defense. 15. If a person against whom an action can be brought on the *peculium* of his son or slave go into hiding, our rule is that his assets can be seized and sold, even though there be nothing in the *peculium*, because it could have some content and it is at the time of judgment that we determine whether there be any content to the *peculium* or not; moreover, the action lies, even though there be nothing in the *peculium*. 16. Let us now consider whether there may be seizure and sale of the assets of one against whom an action to recover property lies. There is an opinion of Neratius that there may; a rescript of Hadrian says the same and that is the law which we apply. 17. Now, Celsus replied to Sextus that if Titius be in possession of the estate which I wish to claim and, he being absent, no defense be raised on his behalf, he, Celsus, thought that the better course was that I be granted *missio in possessionem* of the land rather than that Titius's assets be seized. It is, though, to be noted that Celsus was consulted about an absent person, not one in hiding. 18. Celsus, again, is of opinion that if the person from whom I wish to claim an inheritance go into hiding, the most desirable course is that I should be granted *missio in possessionem* of the assets which he holds as heir or as possessor; if, however, he has deliberately ceased to possess them, then his own property is to be seized and sold. 19. Then the deified Pius ruled in a rescript that if one possessing an inheritance should not make himself accessible, his opponent is to be given possession of the assets of the inheritance. In the same rescript, he further provided that one so benefited through the gross obduracy of the possessor of the inheritance shall take the fruits thereof.

8 ULPIAN, *Edict, book 60:* Should it be uncertain for any length of time whether there is or is not going to be an heir, permission should be given, after investigation of the

matter, for possession of the assets to preserve the cause and, if the matter be urgent or the state of the assets cause concern, we must allow that a curator should be appointed,

9 PAUL, *Edict, book 57:* from among the creditors. 1. If, within the appointed period, one of the heirs elect to accept the inheritance and the other do not express acceptance, we have to consider what is to be done for the creditors. The view which commends itself is that they should be granted *missio in possessionem* of the assets for their safekeeping until the presently undecided heir accept or reject his share.

10 ULPIAN, *Edict, book 81:* If a *pupillus* is present but has no tutor, he is to be held to be absent.

11 PAUL, *Plautius, book 8:* If a legacy or *fideicommissum* be left to a son-in-power, under a condition, we must hold that both he and his head of household are to be granted *missio in possessionem;* for both have an expectation of benefit.

12 POMPONIUS, *Quintus Mucius, book 23:* When the praetor authorizes us to hold assets for the preservation of legacies or a *fideicommissum* or because a *cautio* has not been given us in respect of threatened damage or grants *missio in possessionem* on behalf of an unborn child, we are not in possession of them; rather does he grant us the care and safekeeping of them.

13 PAPINIAN, *Replies, book 14:* A person transferred by a provincial governor for the examination of his cause by the emperor is not obliged to defend other suits at Rome, but he will have to do so in his province. Even if there be no one to undertake the defense of one punished by temporary exile, his property is to be sold.

14 PAUL, *Questions, book 2:* If someone prevent a creditor from taking possession of his debtor's property, an action will lie against him for the value of the issue. 1. If a person granted *missio in possessionem* for the preservation of legacies be not allowed to take it, the measure of damages will be the value of the legacy, even though it be subject to a condition which may not be realized; for it is in his interest that he have security. 2. A conditional creditor, however, is not granted *missio in possessionem* because possession is granted to one who can sell the property under the edict.

15 ULPIAN, *Fideicommissa, book 6:* One who accepts a thing by way of barter is like a purchaser. Again, one who accepts a thing in satisfaction of a claim or who retains it on paying damages or receives it under a stipulation does not make a gratuitous acquisition.

5

THINGS TO BE SEIZED AND SOLD BY A JUDGE'S AUTHORITY

1 GAIUS, *Provincial Edict, book 23:* Assets are to be sold in the place where a person should make his defense, that is,

2 PAUL, *Edict, book 54:* where he has his domicile,

3 GAIUS, *Provincial Edict, book 23:* or where he has contracted. The contract is deemed situate not in the place where the transaction was entered into but where payment is due.

4 PAUL, *Edict, book 57:* If a slave be instituted heir under a condition and there be doubt whether he will become heir and free, it can fairly be decreed, on the application of creditors of the estate, that if he does not become heir within a given period, matters are to proceed entirely as though he had not been instituted heir. This applies

particularly where the condition is that of paying money to someone, and no time is specified for compliance with it. This is the procedure, however, only in respect of the property; whenever liberty comes to him, it will be protected by the praetor although it is beyond doubt that he will not become heir and possessor of the estate. If, though, someone undertake the defense of a person deceased by declaring himself heir and submitting to legal proceedings, the property of the deceased is not to be sold.

5 ULPIAN, *Edict, book 60:* If a *minor* below the age of twenty-five who has curators is not defended by them and finds no one else to represent him, then, even though he does not go into hiding, he will suffer the sale of his property. A person is not deemed to be in fraudulent self-concealment who is not fitted to defend his own cause.

6 PAUL, *Edict, book 58:* If it be not in the best interests of a *pupillus* to retain his inheritance from his father, the praetor authorizes the sale of the estate of the deceased, any surplus going to the *pupillus.* 1. If, before abstaining, the *pupillus* entered into some transaction, it should be upheld, provided that he entered it in good faith. 2. Now what if he pays some creditors and then the estate is sold? If the question be raised whether he has a right of recovery, Julian says that the matter must be so settled that the lack of care or cupidity of one of the creditors shall not redound to the disadvantage of one who has looked after his interests. If, when both [creditors] are pressing, the tutor pays you as a favor, it is just that I should have an equal share or that you should hold in common with me what you have received; so says Julian. He appears to be talking of the case in which payment is made out of the paternal estate. What, then, if the *pupillus* made payment from another source? Our Scaevola says that if there be anything in the estate, it is to be deducted in full from the inheritance as would be the case where a person administers another's affairs; but if there be nothing in the estate, it would not be unfair for the *pupillus* to be granted recovery from the creditor on the ground that he did not owe what he gave.

7 GAIUS, *Provincial Edict, book 23:* A debt is regarded as hereditary even when it be such that action in respect of it could not have been brought against the deceased. Examples would be the case where someone had promised to give something, where the deceased was guilty of delay in discharging his obligation or where someone who acted as verbal guarantor for the deceased made satisfaction after the death of the deceased.

8 ULPIAN, *Edict, book 61:* When assets are sold, usufructs are also sold; for the designation "owner" also includes a fructuary. 1. A creditor granted *missio in possessionem* of a debtor's land should sell or let out any fruits therefrom; but only if they be not already sold or let. For if there be already a sale or letting by the debtor, the praetor will honor it, even though a better money return could have been obtained, unless the relevant transaction was entered into to defraud the creditors; in such a case, the praetor will authorize the creditors to make the sale or letting *de novo.* 2. The same is to be said of the fruits of other things, that is, that if they can be let, they are to be let, for instance, the hire money for slaves or other things which are lettable. 3. The praetor says nothing about the time for letting, and so the creditors would appear to have complete discretion in the matter of the period of the let just as they have over whether to sell or to let; obviously, if their decision be not fraudulent, for they will not be liable for negligence. 4. If there be one person in possession of the assets, the letting will be forthwith; but where there are not one but several, it must be asked which is to do the selling or the letting. If they have agreed on this among themselves, that is the simplest course; for they can all let, leaving the actual transaction to one of their number; but if there be no such agreement, the praetor, after investigating the matter, will have to select the one to do the selling or letting.

9 ULPIAN, *Edict, book 62:* The praetor says: "If a person granted possession does not restore to the person to whom the thing belongs what he takes as fruits or if genuine expenditure which he has incurred is not reimbursed or if the property be alleged to have deteriorated through his deliberate wrongful conduct, I will give an *actio in factum* on the matter." 1. What he says about fruits is to be taken to apply also to any other acquisitions from the debtor's property. It is certainly right that things should be so; suppose that he should receive an award through a submission with another to arbitration; he will have to make over that award. 2. The praetor's words "or if genuine expenditure which he has incurred be not reimbursed" envisage that if the creditor has laid out any money on the property, then, assuming that there was no bad faith in the outlay, he is to be reimbursed even though the outlay did not benefit the debtor. 3. The words "to whom the thing belongs" include a curator appointed to sell the assets and also the debtor himself if it should chance that his property should not be sold. The creditor himself will be given an action against these persons just listed if he has incurred expense in gathering fruits, providing for and looking after the body of slaves, shoring up or repairing buildings, giving an undertaking in respect of threatened damage, or defending a slave in a noxal action, so long as it was not to his advantage that he should surrender the slave rather than to keep him; if it was in his interest to surrender the slave, he cannot claim reimbursement. 4. It may be said generally that he can recover any honest outlay in respect of the property. He cannot recover in an action for administration of another's affairs, any more than could one coowner who shored up the building owned in common, because the creditor in our illustrations has carried out a common enterprise, not one on another's behalf. 5. The following question has also been asked: If the premises have deteriorated, without fraud on the part of the creditor possessor, or rights pertaining to the land are lost or buildings collapse or are burnt down or the slaves and animals are not looked after or if possession be delivered to another, but all without fraud, is the possessor liable to an action? He would appear not to be so liable since he is not fraudulent. His position is thus more favorable than that of a pledge creditor, who is liable for negligence no less than for fraud, and than that of a curator of assets who bears the same liability as the pledge creditor. 6. The praetor gives an *actio in factum* against a possessor who neither sells nor lets the produce of the land, and he will be condemned in the value of what has not been gathered on account of his failure to sell or let. But if as much has been gathered as would have been if he had made the sale or letting, he will not be liable. His obligation is for such time as he was in possession, whether in person or through someone holding on his instructions, until he went out of possession. The creditor's reasons for nonentry into and withdrawal from possession are not to be leveled against him; for he is conducting his own affairs by his own will rather than anything else. However, damages will be assessed on the basis of the interest of the person who brings the action. 7. These are not temporary actions, and they lie both to and against heirs and other successors. 8. If the state of what is possessed be alleged to have deteriorated through the fraud of the person granted possession, the action for fraud will issue against him, an action which does not lie beyond a year and which, arising from delict to recover a penalty, does not lie against an heir or other successor,

10 PAUL, *Edict, book 59:* except to the extent of any benefit that he may have received from the delict.

11 ULPIAN, *Edict, book 62:* However, the action is granted to an heir; for it includes seeking of recovery of property.

12 PAUL, *Edict, book 59:* What if one of several creditors seek *missio in possessionem* of the debtor's assets? Is it only the applicant who gets possession or, when the praetor grants the application of one, do all the creditors get possession? It is more correct to say that when the praetor accedes, he is to be regarded as granting possession not to the individual petitioner alone, but to all the creditors. This is the view of

Labeo also. Here, there is no case of one free person acquiring for another for the person authorized by the praetor does not acquire for himself, but acts on a direction; hence, the other creditors also benefit. Of course, if someone who is not a creditor makes the application, it can by no means be said that a real creditor becomes possessor because such an application has no validity. The case is different if the creditor whose entry is authorized subsequently receives what is due to him; for the other creditors can carry out the sale of the estate. 1. One authorized to possess is deemed to be so authorized in the place, administration of which is entrusted to the person who grants him authority. 2. If possession be impossible by reason of the nature of the property (for example, flooded land) or through the prevalence of brigands, the correct view is that there is nothing to possess.

13 GAIUS, *Provincial Edict, book 23:* Although the assets are not in fact possessed, perhaps because there is nothing to possess or, anyhow, to possess without litigation, nonetheless, a creditor who is given a grant of *missio in possessionem* will be treated as if he in fact was in possession.

14 PAUL, *Edict, book 59:* When a creditor has been granted *missio in possessionem* of the debtor's property, a curator should be appointed lest there be actions that would else not be brought. 1. An action is granted against a creditor granted *missio in possessionem* in respect of anything he acquires arising from the debtor's property; if he has not already received an award, he must cede his actions. It is an *actio in factum* which lies against the creditor who will be required to make over all that could be recovered in an action for administering another's affairs, had it been available.

15 ULPIAN, *Edict, book 62:* When several creditors are granted *missio in possessionem* of the property of their debtor, the transaction should be entrusted to that one of their number whom the majority of the creditors select so that there may be no muddling of accounts. Personally, I think that the creditors should make a summary of the various elements of the estate, not in the sense that they itemize the actual nature of each, but that they note how many and of what sort they are, thereby making, in effect, an inventory; this they may do in respect of the several items. Moreover, there are occasions, when the praetor, having looked into the matter, in the appropriate case, will have to allow the creditors transcription from documents. 1. We should now consider whether the creditors are allowed an inspection and itemization only once or on more than one occasion. Labeo says that no more than one survey is allowed. However, he further says that if the claimant swear that he is not making a false claim and does not have what he itemized [previously], he is to be given no more than a second inspection.

16 GAIUS, *Provincial Edict, book 24:* When the assets of a debtor are being sold, if there be a choice to be made between a third party and one who is a creditor or relative of the debtor, these latter have preference, and the creditor in turn before the relative. As between the creditors themselves, he has priority to whom most is owed.

17 ULPIAN, *Edict, book 63:* It has been asked whether funeral expenses constitute a preferred debt, whether it be the person whose assets are being sold who was buried or someone else. The rule of law which we observe is that, whoever was buried, be it the person whose assets are being sold or be there a debt for which the deceased would be liable if he were still alive, can be sued by the action for funeral expenses. The debt is privileged, and we say that it is of little consequence whether the expenses be claimed by the action just mentioned, the action for dividing an inheritance, or any other action, so long as the outlay was made for an interment. Hence, whatever the action invoked in respect of funeral expenses, the privileged position is open to the plaintiff. By the same token, if funeral expenses be made the object of a stipulation, the preferred position must be held to remain unless the stipulation be

made to waive the privilege. 1. If a fiancée give something by way of dowry and then the marriage be called off, nonetheless, it is fair that in her action to recover the dowry, she be a preferred creditor for all that no marriage be entered into. I think that we should say the same when a girl under twelve be taken to her "husband's" home as though she were a bride, even though she be not yet truly married.

18 PAUL, *Edict, book 60:* (For it is a matter of public concern that she recover in full so that, when she reaches adult age, she may properly enter into a marriage.)

19 ULPIAN, *Edict, book 63:* And for the same reason, we give this position of preference even to a woman of full age. 1. If a person who is not a tutor in fact conduct affairs as though he were a tutor, the privilege obviously operates; and it is of no consequence whether he personally be the debtor or the heir or other successor of the debtor. The *pupillus* himself also has the preferred position but not his heirs. It is also highly appropriate that others for whom curators are appointed on the ground that they are feeble or spendthrifts,

20 PAUL, *Edict, book 60:* or deaf mutes,

21 GAIUS, *Provincial Edict, book 24:* or weak-minded,

22 ULPIAN, *Edict, book 63:* should have the same position of preference. 1. But if a curator be appointed for one who is away or a prisoner of war or during the period that the nominated heirs are considering whether to accept the inheritance, no privileged position is to be granted them for the circumstances are quite different.

23 PAUL, *Edict, book 60:* If someone administers the affairs of an *impubes* out of friendship, the *pupillus* should retain his preferred position when that man's estate is sold and that is the law that we observe.

24 ULPIAN, *Edict, book 63:* If a curator be appointed for an unborn child and the child does not come into being, the preferred position no longer applies. 1. The deified Marcus issued the following edict: "A creditor, who makes an advance for the restoration of a building, is a preferred creditor in respect of what he advances." This applies also to one who pays money to the contractor on the request of the owner of the building. 2. When a moneydealer's assets are to be sold, it is settled that after the claims of preferred creditors, there comes that of one who made a deposit with him, relying on the public indications of his solvency. This is perfectly proper; for it is one thing to have made an advance, quite another to have made a deposit. But if the money be still traceable, I think that it can be claimed from depositees, and the one who claims will come before the preferred creditor. 3. Among ordinary citizens, they have precedence whose money went to pay the preferred creditors. We understand this last expression "went" as applicable whether the money went to the preferred creditors from the later ones directly or rather also through the debtor himself, that is, if it be first paid to the debtor and he transfers it to the privileged creditor. This principle can be applied as a concession; it does not apply if what was done should happen after some time has elapsed.

25 ULPIAN, *Edict, book 64:* The praetor says: "No action will be given in respect of a contract entered into after the person whose assets are sold has decided to defraud if the other contracting party is privy to it."

26 PAUL, *Short Edict, book 16:* One who advances money to build, equip, or buy a ship is a preferred creditor.

27 ULPIAN, *Duties of Consul, book 1:* If the magistrates grant someone *missio in possessionem* to preserve a *fideicommissum,* they can appoint a referee to sell those things which will deteriorate with time, the price raised going to the beneficiary by way of deposit, until the *fideicommissum* due to him be established.

28 JAVOLENUS, *Letters, book 1:* A head of household appointed a substitute heir for his *impubes* son in the event of the son's dying before reaching puberty; the son abstained from his father's inheritance, and so the father's estate was sold; subsequently, the son

received an inheritance, after accepting which he died. My question is this: Since the praetor will not give the father's creditors an action against the *pupillus*, despite his inheritance, can they be given an action against the substitute, bearing in mind that he acquires nothing from the father's estate which has gone to the creditors granted possession of it and that it is no concern of theirs whether the inheritance of the *pupillus* be accepted or not since its assets, not being part of the substituted inheritance, do not fall to the creditors? The thing that particularly prompts my query is that your teachers accept that the will is all one will. The answer follows: Since the praetor gives to a son abstaining from his father's inheritance the relief that no action will issue against him after his father's estate has been sold, then, although he subsequently receives an inheritance, he does not have to hand it over to the creditors. The same does not apply to the person substituted to the son as heir because it is a concession to the son's honor that his father's property should be sold rather than his own, and so the creditors will be refused an action in respect of the son's subsequent acquisitions because they are adventitious and do not come to him from his father. But if the substitute heir receive the inheritance after the son has involved himself in his father's estate, then the inheritances of father and son become one, and the heir, willy-nilly, will be liable for debts of both father and son. And just as he is not free to avoid his obligation so that if he does not make a defense, his own property will be sold, so equally he cannot separate the debts of father and son; should he attempt it, the creditors will be given an action against him. If the substituted heir does not accept the inheritance, the father's creditors will still not be given an action to get at what the *pupillus* leaves behind at death, because his assets are not to be sold in respect of his father's debts, and the acquisitions of the *pupillus* are not part of the father's estate.

29 PAUL, *Lex Julia et Papia, book 5:* Fufidius relates that statues set up in public do not go to the purchaser of the estate of the man in whose honor they were erected; either they are public, if put up to embellish the municipality, or they belong to the person to honor whom they were erected, and in no circumstances are they to be taken down.

30 PAPIRIUS JUSTUS, *Imperial Rulings, book 1:* The Emperors Antoninus and Verus, *Augusti*, ruled in a rescript that those who claim that their property is unlawfully sold should have raised a preliminary issue on the matter and that an appeal to the emperor to rescind the sale will be in vain.

31 ULPIAN, *All Seats of Judgment, book 2:* If creditors doubt the solvency of the heir, they can demand security that his debt will be paid off. In this context, the praetor is to investigate the matter and not immediately to direct him to give security, but to do so only if, after his investigation, he decides that the interests of the applicants should be safeguarded. 1. The suspect heir is not weighed up in the same way as a suspect tutor. In the case of the tutor, it is not his solvency or insolvency, but his fraudulent and underhand dealing with the affairs of his *pupillus* which designates him suspect; in respect of the heir, one looks solely to his financial position. 2. Of course, those who allege the heir to be suspect are to receive a hearing if they are concerned with an inheritance recently accepted; if, on the other hand, they be shown to have suffered his being heir for some time and they cannot allege against him any offense or sharp practice, the heir is not to be subjected to this requirement after the passage of time. 3. But if a suspect heir, ordered by praetorian decree to give security, does not comply, the praetor will then direct and authorize that the assets of the estate be seized and sold under the provisions of his edict. 4. Of course, if the praetor be apprised that the heir has alienated none of the assets of the inheritance and that nothing can properly be charged against him but his lack of means, he will confine himself to directing the heir not to diminish the assets. 5. And if the creditors cannot even show the heir to be laboring under a lack of resources, they will be liable to him in the action for insult.

32 PAUL, *Rules, sole book:* It is not the time that they are incurred, but their ground

which makes debts privileged, and if their ground be the same, they exist concurrently even though they arise at different times.

33 ULPIAN, *Rules, book 3:* If a *pupillus* be not defended on some transaction of his and, on that account, creditors take possession of his assets, there must be a deduction from those assets to provide for the maintenance of the *pupillus.* 1. Just as defense may be made of a debtor before his assets are taken into possession, equally, even after the grant of possession, whether he undertake his own defense or another on his behalf, he is to give security that the decision will be honored by virtue of that security, the creditors' possession will cease.

34 MARCIAN, *Rules, book 5:* A claim for money advanced for the building, purchase, fitting out, or equipment of a ship in any way or one in respect of the sale of a ship takes precedence after a claim by the imperial treasury.

35 MARCIAN, *Action on Mortgage, sole book:* A person granted *missio in possessionem* of the estate of one away on state business has lawful possession until his claim is met, if it be established that the absence is deliberate; but one given *missio in possessionem* of the estate of a person who is not deliberately away on state business, does not acquire a pledge and consequently should go out of possession.

36 ULPIAN, *Sabinus, book 45:* One who lurks behind pillars to avoid his creditor is undoubtedly in hiding as also is one who goes into retirement, that is, surreptitiously disappears so that an action may not be brought against him, so too one who flees the city fraudulently. In the matter of going into hiding, it is all the same whether one flees or, while still at Rome, does not make an appearance.

37 PAPINIAN, *Replies, book 10:* The right to claim real security pertains to Coela Syria, a city belonging to Antioch, because it is given a preferred position in respect of the property of a deceased debtor by its local statute.

38 PAUL, *Views, book 1:* A concubine and natural issue are excluded from the sale of assets. 1. The state as creditor takes precedence over all creditors with a document of contract.

39 PAUL, *Views, book 5:* If no defense is made of a *pupillus,* a competence is to be provided for his maintenance until puberty out of his assets of which his creditors are granted possession. 1. The estate of a prisoner of war cannot be sold until he returns.

6

SEPARATIONS

1 ULPIAN, *Edict, book 64:* One must know that separation is applied for under a decree of the praetor. 1. There follow the grounds on which creditors will be granted separation: Suppose that someone had Seius as his heir; Seius dies, leaving as his heir Titius who is insolvent and suffers the sale of his estate on bankruptcy. Seius's

creditors say that Seius's property will satisfy them and that those of Titius should be happy with his assets and thus there should be, so to speak, a sale of the two estates. But it could be the case that Seius was solvent and could satisfy his creditors in full or at any rate in part but that if the creditors of the insolvent Titius are admitted to share with them, they will receive reduced satisfaction by reason of his insolvency or of the fact that the number of his creditors is greater. In such circumstances, it is most fitting that if the creditors of Seius apply for separation of the two estates, the praetor should hear them and grant their application so that each creditor may then get separately that to which he is entitled. 2. The creditors of Titius, on the other hand, will not seek such separation; for it is permissible for someone, by adding a creditor to himself, to worsen the position of his own creditor. Certainly, one who enters upon the inheritance of my debtor does not thereby worsen my position, because I can apply for its separation, but he does disadvantage his own creditors in entering on an estate which is insolvent, and they cannot apply for separation. 3. Another thing to be known is that even if the asset in question be said to be the object of a pledge or hypothec made by the heir, nevertheless, assuming that it really is part of the inheritance, the person who applies for separation will prevail over the hypothec creditor, by virtue of the separation; and so ruled Severus and Antoninus in a rescript. 4. Separation can also be sought as against the imperial treasury or against the citizens of municipalities. 5. The question has been asked whether creditors of an heir can sometimes seek separation, if perchance their man accept the inheritance in fraud of them. But no redress is forthcoming; those who do business with such a person have themselves to blame. Of course, we might think that the praetor outside the normal course of jurisdiction, should grant relief against the chicanery of one who has perpetrated such a fraud; but this is difficult to concede. 6. If a man who alleges that the inheritance is insolvent be nonetheless obliged to accept it and make it over to someone else, then in the sort of circumstances which give rise to relief, it will not be that someone else who gets the relief. But if the man himself seek relief, we assist him against the creditors of the inheritance; and the deified Pius provided in a rescript that in such a case, the testator's estate is to be sold as if the inheritance had never been accepted. I think that the same concession should be made, if the creditors of a reluctant heir of this sort petition, even though he himself does not, so that a kind of separation of assets will be granted them. 7. Let us now consider this case: While still *impubes*, a person is heir to his father and dies before reaching puberty, and there is a sale of the assets of the substitute heir who takes the inheritance of the *impubes*; can the creditors of the father ask for separation? I think that they can; and I am even more strongly of opinion that creditors of the *impubes* can seek separation as against those of the substitute heir. 8. In the same view, suppose that Primus appoints Secundus his heir and Secundus appoints Tertius his heir and the estate of Tertius is sold; which set of creditors can apply for separation of assets? I think that if the creditors of Primus apply, they claim hearing against the creditors of both Secundus and Tertius; but if those of Secundus apply, they do so against those of Tertius but not those of Primus. In brief, Primus's creditors claim separation against all other creditors, those of Secundus can so claim against the creditors of Tertius but not those of Primus. 9. Another question is this: Suppose that the estate be sold of a son-in-power who has a *peculium castrense*, is separation to be made between creditors of his military assets and other creditors? I think that all the creditors are to be admitted together, but if there be any who had dealings with him before he became a soldier, perhaps they should be excluded; that, I think, is the course to follow. Hence, if acquisitions made on service be sold, the creditors of his civilian days cannot participate in the sale with those having claims on the assets derived from soldiering. Again, if any of his civilian transactions was turned to the benefit of his head of household, the creditor can perhaps be ordered not to claim against the *peculium castrense*; for he, with greater right, can bring an action against the father. 10. Know further that only those creditors may petition for separation who have not stipulated from the heir by way of novation. If they did have the intention to novate, they lose the benefit of separation (for they seek to enforce the

heir's own debt), and they cannot now seek separation from the heir since, in a sense, they chose him as debtor. The same applies if, in similar circumstances, they claim interest from him. 11. It is also asked whether they can petition for separation when they have accepted security from the heir. I think not, because they are really suing him himself. Of course, someone may raise this point: What if the security which they accept be inadequate? They can then blame only themselves for accepting unsatisfactory verbal guarantors. 12. It is further to be borne in mind that once the assets of the inheritance and those of the heir himself are mixed, there can be no claim for their separation; for once the assets be put together and become one estate, separation thereafter is precluded. What, then, if there be lands, slaves, animals, or something else which could be the object of separation? In such a case, separation can be sought, and there will be no acceptance of a claim that they have been incorporated; for this is not possible in the case of lands unless they have been so linked with and made one with the defendant's own land that their separation has become impossible; and the likelihood of that is extremely rare. 13. When it is said that separation may not be sought after the passage of a length of time, this means that once five years have elapsed since the acceptance of the inheritance, there can no longer be a claim for separation. 14. Now, in all these instances, it is for the praetor or governor, and for no one else, to investigate whether separation should or should not be granted, that is, it is a matter for the person who has power to grant the claim. 15. If someone accept a pledge from the heir, he is not to be granted separation for the heir himself is his defendant; nor is he to be heard who in any way proceeds against the heir as having chosen him as his opponent. 16. The question has been put: Suppose that there are several creditors, some of whom proceed against the heir himself and others not and those latter seek separation; are the other creditors granted separation with them? I think that they do not have that benefit; they are to be counted among the creditors of the heir in his personal capacity. 17. It has also to be noted that the general view is that if there be anything left over from the sale of the testator's property, the creditors of the heir can have it credited to what is due to them but creditors of the testator cannot similarly claim in relation to the heir's property. The rationale of this is that one who claims separation must bear the consequences of his own misjudgment, if, when the resources of the heir be adequate, he prefer that the assets of the deceased be separately appropriated for himself; the creditors of the heir do not incur the same charge of misjudgment. So if the creditors of the deceased request that they should also be given a place in respect of the heir's property, they are not to be heard; for the separation which they themselves request distances them from such assets. However, if the creditors of the deceased rashly seek separation, they may ask for leniency—obviously, on establishing that they were in complete ignorance of the true state of things. 18. It should further be known that a slave, granted his freedom and made *necessarius heres* to an inheritance, since he cannot refuse it, can petition for separation, doubtless because, if he has no dealings with his patron's estate, he is in such a case that any subsequent acquisitions that he makes are to be appropriated to himself. So also if the testator owe him anything.

2 PAPINIAN, *Questions, book 25:* Assuming that there be no suspicion of fraud, once the heir sell the inheritance, there can be no claim for separation; for the transactions genuinely entered into by the heir in the interim are to be held valid.

3 PAPINIAN, *Questions, book 27:* The debtor becomes the heir of one who was his verbal guarantor and the guarantor's estate is sold. Although the obligation arising from the guarantee no longer exists, separation can still be claimed by a person to whom the guarantor was under obligation, whether he be the sole creditor of the inheritance or there be others. It would not accord with the spirit of the law that the ground of suretyship being excluded by reason of the principal obligation, which is the more important, a creditor who carefully watches over his own interests should suffer loss. 1. Now what is the position if, the guarantor's estate being separated, the creditor cannot recover in full from the inheritance? Is he to receive a share with other creditors of the heir or has he to make do with the assets that he chose to have separated? If the man who took the stipulation be able to join in a claim for the balance due to him with the other creditors of the debtor when the estate of the guarantor is sold because the defendant did not accept the inheritance, reason will not tolerate his claim being rejected. 2. In the case of any other creditor, however, who seeks

separation, it is rather to be said that if he cannot recover in full from the inheritance, he will get at least something therefrom, once the creditors of the heir himself have been dealt with. This is certainly the case with creditors of the heir, once the creditors of the inheritance have been dealt with.

4 PAPINIAN, *Replies, book 12:* Creditors whose debt is due at a future time or under a condition, so that they cannot presently claim the money, can also be granted separation; for their interests are looked to by this general security. 1. It is further accepted that legatees have a right of pledge, but only over what may be preserved from the assets.

5 PAUL, *Questions, book 13:* Put the case that creditors of an inheritance seek separation of assets and it be found that there is not enough in the inheritance but that the heir has adequate resources. They cannot now come back against the heir but must stand by what they first claimed. If, though, after separation has been sought, the heir acquire something, of course by way of the inheritance, the petitioners for separation have a claim also in respect of this acquisition; but if the heir gives them their due, what may be left over is to go to the heir's own creditors. If, however, the heir's acquisition be from an extraneous source, the creditors of the inheritance as such have no claim. There are, though, those who think that, in such a case, if the heir's own creditors receive payment in full, anything over should go to the creditors of the inheritance; personally, I am not of that view; for in petitioning for separation, these creditors turned away from the heir personally and took and sold the assets as those of the deceased and those assets cannot be subsequently augmented. I think that the same holds good even if, having misled themselves in the matter of separation of assets, they finish up with less than the heir's own creditors. For the heir's personal creditors have both his present personal assets and what he may acquire during his life.

6 JULIAN, *Digest, book 46:* Whenever an heir's estate is insolvent, it is perfectly proper that not only creditors of the testator but also legatees may petition for separation so that, once the creditors have been satisfied in full, the legatees may acquire all or part of what is left to them. 1. If a freedwoman, named heir, seek *bonorum possessio* in accordance with the will of a testator who dies insolvent, the question arises whether her estate can be separated from that of the inheritance. The answer is that it is not unfair that her patron should be relieved from being saddled with debts, which, by seeking *bonorum possessio secundum tabulas*, the freedwoman incurred.

7 MARCIAN, *Rules, book 2:* Those who institute proceedings against an heir can seek separation as though they were creditors of the inheritance; for they are under the necessity so to act.

7

THE APPOINTMENT OF A CURATOR FOR AN ESTATE

1 PAUL, *Edict, book 57:* If someone be instituted heir under a condition, he has to comply with it, if he can, or if he says that he will not accept the inheritance even if the condition be realized, the deceased's estate will be sold. 1. But if this be difficult to effect, a curator is to be appointed and the estate not sold. 2. Should there be a heavy debt which is being increased by penalties, the curator is to be directed to discharge it as in the case of an estate held for an unborn child or of a *pupillus* who does not have a tutor.

2 ULPIAN, *Edict, book 65:* In the matter of appointing a curator, the rule which we observe is that the praetor is approached and he appoints a curator or curators with the agreement of the majority of the creditors; if the property to be sold is in a province, it is the governor who makes the appointment. 1. The acts and so forth of

persons so appointed will be held ratified; and *actiones utiles* will issue both to and against them, and if the curators detail someone to sue or defend proceedings, that is lawful; nor will he be required to give security for the honoring and satisfaction of the judgment in the name of the person whose estate is being sold but in the name of the curator who sent him. 2. Now where several curators be appointed, Celsus says that they sue and are sued for the full amount and not by shares. But if curators should be appointed for regions, say, one for property in Italy and another for what is in a province, I think that each must stick to his own region. 3. It is asked whether a man can be appointed curator against his will; Cassius writes that no one can be obliged to become curator of an estate against his will and that is the more correct view. And so a willing person must be sought unless, through pressing necessity or the emperor's direction, matters so proceed that even an unwilling one be appointed. 4. It does not always have to be a creditor who is appointed curator; there can also be a noncreditor curator. 5. Suppose that three curators are appointed, one of whom does nothing; will an action be given against that one? Cassius thinks that a plaintiff is not to be limited in his choice of defendant, and I hold Cassius's view to be correct. After all, we have to consider what has been recovered, not what comes to an individual curator and so we proceed, unless he was appointed against his will; in such a case, it must be said that proceedings will not lie against him.

3 CELSUS, *Digest, book 24:* If several be appointed curators of the same estate, the plaintiff will be granted an action for the full amount against whichever of them he chooses to sue just as each of them can bring an action for the full amount.

4 PAPIRIUS JUSTUS, *Imperial Rulings, book 1:* The Emperors Antoninus and Verus, *Augusti,* held in a rescript that where an estate is sold by curators under a *senatus consultum,* no action lies to a deceiver on previous dealings.

5 JULIAN, *Digest, book 47:* Suppose that the debtor quits the marketplace [that is, goes bankrupt] and the creditors, taking counsel among themselves, choose one of their number to effect the sale and to give each his share of the proceeds of sale and then someone else appears, claiming to be a creditor; such a person will not indeed have an action against the curator, but he may join in together with the curator in the sale of the debtor's estate on the footing that what is received by the curator and the creditor separately will be shared by all according to their claims against the debtor.

8

RESTORATION OF WHAT IS DONE IN FRAUD OF CREDITORS

1 ULPIAN, *Edict, book 66:* The praetor says: "In respect of transactions for the purpose of fraud, entered into with one privy to the fraud, I will give an action, within a year from the time that proceedings may first be taken, to the curator of the estate or the person to whom an action should be granted in the matter. I will grant it also against the person who effects the fraud." 1. The praetor had to pronounce this edict in which he looks to the interests of creditors by reclaiming anything that has been alienated in fraud of them. 2. The praetor says: "transactions for the purpose of fraud." These words are general and cover anything done to defraud, be it an alienation or any transaction whatever. And so anything done for fraudulent purposes,

whatever it be, is deemed undone by these words; for they receive a wide interpretation. Whether the cheat has alienated something or freed someone from an obligation by formal release or by agreement

2 ULPIAN, *Edict, book 73:* the same applies, as also if he release pledges or gives preference to someone else in fraud of his creditors,

3 ULPIAN, *Edict, book 66:* or affords him a defense, whether he became indebted to defraud his creditors or paid over money or if he do anything whatsoever in fraud of creditors, this edict is obviously applicable. 1. As transactions for the purpose of fraud, we regard not only what someone may do by way of contract but also his deliberately not appearing for an action, his allowing an action to lapse, his failure to sue a debtor so that he may be discharged by lapse of time or his losing some usufruct or servitude. 2. And this edict applies to anyone who does anything to cease to hold what he presently holds.

4 PAUL, *Edict, book 68:* A man is also to be regarded as acting fraudulently who fails to do what he should do, that is, he does not make use of a servitude,

5 GAIUS, *Provincial Edict, book 26:* or treats a thing which he owns as derelict so that someone else appropriates it.

6 ULPIAN, *Edict, book 66:* But this edict does not apply to a man who does not claim something, the acquisition of which he could seek by action; the edict is directed against those who reduce the value of their patrimony, not those who so act that it be not increased. 1. Hence, a person who does not comply with a condition so that a stipulation will not become due is in the position that he does not fall within this edict. 2. In the same way, one who renounces an inheritance, whether testate or intestate, does not fall within the scope of this edict, for he declines to increase his assets; he does not diminish his patrimony. 3. In like manner, it must be said that if he emancipate his son so that the latter's acceptance of an inheritance is his own affair, this edict will have no place. 4. It is also true that if he renounce a legacy, the edict is inoperative, and Julian also writes to this effect. 5. Suppose a man to alienate the slave whom he has instituted as his heir, so that the slave would accept the inheritance at the purchaser's behest, the edict will not operate if there be nothing fraudulent in the sale, as distinct from the inheritance, for it would be permissible for the purchaser to say "no" to the inheritance. There would, though, be redress if the actual sale of the slave were fraudulent, just as there would be if he had fraudulently manumitted the slave. 6. It is written in Labeo that a person who receives what is his commits no fraud; we mean one who receives what is due to him; for it is fair to say that one obliged to pay by the governor not unjustly does so with impunity. The whole edict which concerns us relates to transactions in which the praetor has no part, such as pledges and sales. 7. It should be known that Julian writes that our law is that one who accepts money due to him, before the debtor's assets are seized, need not fear this edict, even though he receives it in full knowledge that the debtor is bankrupt; for he is looking after his own interests. But one who receives his due after seizure of the debtor's estate will be called to a leveling-out proportionally with the other creditors; for he has no claim to precedence over the others, once the estate is possessed, since then all the creditors are on an equal footing. 8. This edict constrains a person who, knowing the other party to be acting in fraud of his creditors, receives what is to their fraud; hence, if he accept the thing in ignorance thereof, the terms of the edict do not apply to him. 9. Another thing that should be known is that a man who, with the consent of the creditors, buys or stipulates for something from the fraudulent debtor or makes some other contract with him is not regarded as doing so in fraud of the creditors. No one can be held to defraud those who both know and give consent. 10. Should some transaction with a *pupillus* be in fraud of creditors, Labeo says that it is in all cases to be rescinded, if the creditors are in fact defrauded; for the ignorance of the *pupillus*, by reason of his age, should not be deleterious to the creditors nor a source of gain to himself; and that is the law which we apply. 11. In like manner, we

say that if someone receive a gift, no inquiry is to be made into his state of awareness, but only into whether there be a fraud on the donor's creditors; and an innocent donee is not regarded as suffering a wrong because when a benefit is taken away from him, he is not made to suffer any loss. However, those who innocently receive some liberality from an insolvent are liable to an action to the extent of their enrichment thereby but not beyond. 12. The question is equally asked whether the master be liable if a slave receive something from one whom he, but not his master, knows to be insolvent. Labeo says that the master is liable to the extent that he has received any benefit or else he will be condemned in the amount of the *peculium* or of benefit taken. The same applies in respect of a son-in-power. But if the master knows of the insolvency, he is to be sued in his own name. 13. Equally, if a *heres necessarius* discharge legacies, Proculus says that even though the legatees be unaware that the testator was insolvent, an *actio utilis* is to be given against them; and, of that, there can be no doubt. 14. We compute the year for this action as one of a year of days on which proceedings are possible as from the date of the sale of the estate.

7 PAUL, *Edict, book 62:* If, in fraud of his creditors, a debtor sell land at a low price to one aware of his insolvency, then those to whom the action under discussion lies claim the land, it is asked whether he should give the creditors the price. Proculus is of opinion that the land is to be made over, even though the price be not paid; and there is a rescript in accord with the view of Proculus.

8 VENULEIUS SATURNINUS, *Interdicts, book 6:* From this it may be gathered that not even part of the price is to be made over to the purchaser; it can, though, be said that the judge in the matter should consider whether, if the moneys paid be among the assets of the estate, he should direct them to be handed over; for, in that way, no one is defrauded.

9 PAUL, *Edict, book 62:* One who knowingly buys a thing from a debtor whose estate has been taken into possession then sells it to a purchaser in good faith; it has been asked whether this second purchaser can be sued. The better view is that of Sabinus, that is to say, that a purchaser in good faith cannot be sued; for fraud should bring harmful consequences only for him who practices it; we should say the same if the second purchaser bought the thing in ignorance from the debtor himself. But the person buying in bad faith who sells the thing to a purchaser in good faith will be liable for the full price that he receives for the thing.

10 ULPIAN, *Edict, book 73:* The praetor says: "When Lucius Titius with your knowledge does something for the purpose of fraud to the estate which is the object of the proceedings, the action given under my edict will lie and issue to the creditors, if you do not restore the thing to him within a year from the time when proceedings might first be brought. Sometimes, even when there is no knowledge, after investigating the matter, I will grant an *actio in factum.*" 1. Restoration of what was done in fraud of creditors follows only if the fraud has its consequences, that is, if the defrauded creditors sell the debtor's estate. But if he pays off those whom he sought to defraud and gets other creditors, then, on the assumption that he pays off the first creditors unconditionally and later gets the others, there will be no claim. But if he uses the money of those he does not seek to defraud to pay off the first creditors whom he did wish to defraud, Marcellus says that proceedings will lie. The Emperors Severus and Caracalla issued a rescript adopting this distinction, and that is the law which we observe. 2. When the praetor says, "with your knowledge," we take that to mean "you being

aware of and participating in the fraud"; it is not enough that one knows him to have creditors to claim that the *actio in factum* should lie; there must be participation in the fraud. 3. If someone was not initially privy to the fraud, but when the debtor made the sale, he is called upon by the creditors before witnesses not to buy, will he be liable to the *actio in factum* if he in fact makes the purchase? The more correct view is that he will; for there is no lack of fraud in one who continues with the transaction after being so called on. 4. On the other hand, one who simply knows his vendor to have creditors without awareness of the fraud, is not deemed liable to the action. 5. The praetor says, "with your knowledge," meaning the person against whom proceedings lie. What, then, if the tutor of a *pupillus* knows but not the *pupillus* himself? Let us consider whether the action lies, the tutor's knowledge being to the disadvantage of the *pupillus*. The same problem arises in respect of the curator of a lunatic or a *minor*. I think that the knowledge of the guardian is to the detriment of such persons to the extent that they have received any benefit from the transaction. 6. It should further be known that it can be asked whether recovery may be sought of what is said to have been alienated, if they be the same creditors. And if there be only one creditor of those defrauded, whether he was then sole creditor or whether he alone remains when the others have been satisfied, it is to be said that the action lies. 7. It is certainly the case that the action lies if the defendant knows that one creditor is being defrauded but knows nothing of the others. 8. Now what if the one of whom he knows receives satisfaction? Surely the action then does not lie because he does not defraud the remaining creditors. I think that the view which commends itself. If, however, a man say, "I offer what is due to one whom I know to be a creditor," he will not be heard if he seek to avoid the action. 9. If the cheat had an heir and the heir's estate be sold, the action will have no place because this did not happen in respect of the property which was the object of proceedings. 10. If a fraud on creditors be perpetrated by a son who can abstain from his father's estate and then he gets *restitutio in integrum* in respect of his meddling with the estate, or even if a *voluntarius heres* did so or if he deserved *restitutio in integrum* by reason of age or for some other good cause, it must be said that an *actio utilis* will lie. The same applies to a slave who is *heres necessarius*. Labeo writes that this last is to be accepted with the following distinction; if the creditors sell the estate forthwith or, the creditors being absent or not consenting, the *heres necessarius* meddle with the estate, the fraud of both can be reclaimed, that is, that of the testator and the heir's own; but if the creditors tolerate the *heres necessarius* and proceed as if his obligation is the object of their claim, whether by exacting only mild interest or on some other ground, it must be held that nothing can be reclaimed from what the testator alienated. 11. If an *impubes* be heir to his father and the estate of the deceased be sold, when separation of the assets is sought, the fraud of each can be reclaimed, that is, that of the *pupillus* and of his tutor or curator. 12. If a debt be exigible as from a future date and the fraudulent person disposes of his money now, the *actio in factum* will lie for the advantage I obtain by cash payment; for the praetor will detect fraud even in respect of a debt to be claimed in the future. 13. It has been very often laid down that the action will lie where someone does not receive payment but accepts a pledge for a longstanding debt. 14. If a woman, conceiving the plan of defrauding her creditors, gives a formal release of a debt due to her from her husband, who is also her debtor, by way of creating a dowry, to give effect to that plan, this action will lie, and, by it, there will be exacted all the money which the husband owed and the wife will have no action on the dowry; for no dowry should be created in fraud of creditors; this is surer than sure and has been repeatedly laid down. The upshot of the action will be that the stipulation from which release was given will be reinstated. 15. By this action, servitudes can be

claimed and a stipulation in the form: "Do you promise the payment of ten annually?" 16. If I catch one who is a debtor both to me and to several other creditors making his flight with his money and I take from him what is due to me, the opinion of Julian commends itself; this is that it is of great consequence whether this occurs before the creditors are granted possession of his estate or later; if before, there is no room for the action, but there will be, if it be after they receive the grant. 17. And if, under the ruling of the deified Marcus, there has been *addictio* of an estate to someone to preserve manumissions made in the will, it has to be said that the action does not operate. The result is that the dispositions of the head of household are valid. 18. The year of availability of this *actio in factum* runs from the date of the sale of the estate. 19. Under this action, the thing is to be restored together with any accretions to it. 20. And not only the fruits that he does gather but also those that the fraud could have gathered come into the reckoning, but with the proviso that any expenses which he has incurred be deducted; for within the judge's discretion, the defendant is not obliged to restore the thing until he has recovered expenses properly incurred, so also if someone else make an outlay by the wish of the verbal guarantors or the creditors. 21. I think that the more correct view is that issue also come within the scope of this action. 22. It should, moreover, be known on a general plane that restitution is to be made to the original state of things where what is in issue be a tangible or an obligation, so that all will be as though no release therefrom had been made; interest, though, will not be due, thinking in terms of benefit accruing in the meantime, if not provided for by stipulation or unless the contract be such that interest is due, even though not provided for. 23. If an obligation be conditional, it is to be restored subject to its condition; the same is true of a debt exigible from a future date. But, in the latter case, it can be said that restitution may be sought, not within the year as earlier indicated, but within the period that remains for satisfaction of the obligation. 24. The action will lie beyond the year in respect of derivative benefit against the person against whom proceedings are instituted; the praetor was of opinion that it would be reprehensible that one who knew that his gain derived from fraud should continue to enjoy it, and so he thought that it should be extracted from him. Hence, whether it be the fraud himself who benefits or someone else, the action lies for the benefit which he has received or which, through his own fraud, he has not received. 25. This action lies to heirs and other successors but not against heirs and the like.

11 VENULEIUS SATURNINUS, *Interdicts, book 6:* Cassius introduced the action for the benefit which comes to an heir.

12 MARCELLUS, *Digest, book 18:* If a head of household give his son-in-power full administration of his *peculium*, he is not deemed to grant him the power to make an alienation in fraud of creditors; for he cannot make such alienation. But if the head of household should have authorized the son to alienate, even in fraud of creditors, he is treated as perpetrating the fraud himself and the relevant actions will lie against him himself. Moreover, creditors of the son are creditors of the father also; for, of course, they have an action that they should be satisfied out of the *peculium*.

13 PAUL, *Edict, book 68:* It is settled that one holding a pledge is not liable to this action; for he holds in his own right as a pledge and not on the basis that he possesses it for the preservation of the issue.

14 ULPIAN, *Disputations, book 6:* By this *actio in factum*, not only is the ownership of tangibles reclaimed but also legal proceedings are reinstated. In consequence, the action lies against those who do not possess the thing to restore it and also against whom proceedings are competent to make them surrender an action. For instance, if

someone introduce Titius for the cheat to deliver the thing to him, he must make over his action for mandate. Hence, if the cheat give a dowry for his daughter to one aware of the state of affairs, to defraud creditors, the daughter will be liable to make over her action on the dowry against her husband.

15 JULIAN, *Digest, book 49:* Suppose a man to be debtor to Titius and, knowing himself to be insolvent, to grant manumissions in his will; having paid off Titius, he then becomes the debtor of Sempronius and dies, leaving the same will in operation; the manumissions are to be held valid, even though the inheritance be not solvent, for to nullify the grants of freedom, we require that in respect of each, there should be the intent and its achievement. So if the creditor, whom there was a design to defraud, is not in fact defrauded, the manumissions are held good against those creditors, whom there was no intent to defraud,

16 PAUL, *Replies of Papinian, book 5:* unless it be established that the first creditors have been paid off with the money of the later creditors.

17 JULIAN, *Digest, book 49:* All debtors granted release from their obligation by this action are recalled to their former obligation. 1. Lucius Titius, having creditors, nonetheless transferred all his assets to his freedmen and natural issue. The reply was that although it is not alleged that he had the intention to defraud, nevertheless, one who, knowing that he has creditors, alienates all his property is to be treated as having the intent to defraud his creditors. Hence, even if the sons of such person do not know their father to have been of this mind, they will be liable to the action. 2. If a husband, seeking to defraud his creditors, restore the dowry to his wife on the end of their marriage before the stipulated time for such return, the woman will be liable under this action for the creditors' interest in the dowry's being returned at the appointed time; for the praetor discerns fraud even in paying off what is due at a later date.

18 PAPINIAN, *Questions, book 26:* If a wife return a pledge to her husband or the husband to his wife, the better view is that they do not intend a gift. But there is no doubt that if this is to the fraud of creditors, the pledge will be reconstituted under the *actio utilis*. So also if any debtor at all yield up a pledge in fraud of creditors.

19 PAPINIAN, *Replies, book 11:* I replied that there was no fraud on creditors when a father, not waiting for his death, transferred to the son, released from his power, the *fideicommissum* of his mother's inheritance without deduction under the *lex Falcidia*, since his conduct demonstrated full faith and all due respect.

20 CALLISTRATUS, *Questions, book 2:* It is settled that a debtor who transfers the whole estate under the *senatus consultum Trebellianum* is not to be held to have alienated in fraud of creditors the portion that he was entitled to retain; rather has he faithfully carried out the wishes of the deceased.

21 SCAEVOLA, *Replies, book 1:* A debtor, in fraud of his creditor, came to an arrangement with his neighbor over the boundaries of the land which he had given by way of pledge; the question was whether a purchaser from the creditor could bring the action for settling boundaries. The reply was that on the case put forward, he could, because the debtor had made his agreement without the knowledge of the creditor.

22 SCAEVOLA, *Replies, book 5:* One creditor accepted pledges in respect of a long-standing debt; I ask whether this is irrelevant to the question of fraud on the other creditors. The reply was that the creditor was not, on that ground, to be barred from claiming his pledge, because he agreed that it should be a pledge for an old debt, unless it was done in fraud of the other creditors and conflicted with the legal provisions whereby frauds on creditors are rescinded.

23 SCAEVOLA, *Digest, book 32:* Heirs of the first degree, though of opinion that the assets of the deceased would scarcely meet a quarter of his overall debts, nevertheless, to save the good name of the deceased, with the agreement of the creditors and by the authority of the provincial governor, in accordance with an imperial ruling,

accepted the inheritance on the condition that they should pay the creditors only part of what was due to them; the question was asked whether slaves manumitted in the will could receive their liberty and maintenance. The reply was that provided that it was not given to defraud creditors, the grant of liberty stood, but if the inheritance were insolvent, not the legacies.

24 SCAEVOLA, *Questions Publicly Discussed, sole book:* A *pupillus* succeeded his father as heir and paid one of the creditors; he then renounced his father's estate which accordingly was sold. Should what the creditor received be reclaimed so that his position might be no better than that of the other creditors? We have to distinguish according as it was received by way of favoring or preference or not; if it was done as a preference or favor by the tutors, reclamation will be made to the same proportion to which the other creditors would be entitled; but if the creditor made a fair claim and the other creditors were remiss in pressing their claims and the whole matter has meanwhile deteriorated through the death of living assets, the removal of movable ones or the reduction to nothing of immovable assets, what the creditor received is in no way recoverable, since the other creditors must bear the consequences of their own negligence. Now what if, circumstances being such that my debtor's estate falls to be sold, he pays me the money due to me; can that money be claimed from me? Again, a distinction must be taken: Did he choose to pay me, or did I exact the money from an unwilling debtor with the result that in the latter case, a claim would be possible but not in the former case? I was looking after my own interests and so improved my position and the civil law is designed for those who look after themselves; accordingly, there will be no claim for what I received.

25 VENULEIUS, *Interdicts, book 6:* If the defrauder formally releases a debt to a verbal guarantor who is aware of the fraud and the debtor also is not unaware of it, both will be liable; otherwise, only the one with knowledge. We have to consider this question: If the guarantor to whom release was made be insolvent, should not the action still lie against the principal debtor, even though he be not privy to the fraud? For to him the release is a form of gift. On the other hand, if the release be granted to a debtor who knows of the fraud, the guarantor also will be liable if he too is aware of it; but if he be unaware, should the action not still lie equally against him since he incurs no loss and rather profits? Each of them, debtor and guarantor, is in the same case. 1. If a son-in-law with knowledge of the facts accept a dowry from his fraudulent father-in-law, he will be liable to this action, and if he restores what he received, he will cease to have the dowry; and if the wife be emancipated, in the event of a divorce, nothing is to be restored to her says Labeo, because the action is for making reparation not to impose a penalty; if, therefore, the defendant husband has restored what he received, he is to be absolved; but, should he have made it over to the ex-wife when sued in the action for dowry before the creditors take proceedings against him, Labeo says that he will still be liable to the action presently under discussion and he will have no recourse against his former spouse; it is a matter for consideration, though, whether he has such recourse if he returned the dowry to her without legal proceedings. Now if the son-in-law were innocent but the daughter knew of the fraud, she will be liable, and if both knew, both are liable. In the event of neither knowing, there are some who think that the action should still issue against the daughter because she should be regarded as having received something by way of gift; alternatively, she should at least give security that she will make over what she received. But no action will lie against the innocent husband, any more than it would against a creditor who received what is due to him from a fraudulent debtor, because he would not have married a wife who came without a dowry. 2. In like fashion, if some third person furnish a dowry for a daughter in power with a view to defraud his creditors, the husband will be liable, if aware of the facts; so also, the wife in similar circumstances and, indeed, also her father with knowledge who will have to give security that he will restore any dowry which comes into his hands. 3. Should a procurator, without his principal's knowl-

edge, bid a slave accept something from a debtor whom he knows to have the intention of defrauding his creditor, the procurator himself, but not his principal, will be liable to this action. 4. Restoration requires return of not only what was alienated but also, if it be land, of the produce growing in the land at the time of the alienation, because they passed in fraud of creditors, as well as that gathered after proceedings have commenced. Produce taken in the interim is not subject to restoration. Similarly, a child born in the interim to a slave-woman alienated in fraud does not have to be handed over; for it was not part of the debtor's estate. 5. Proculus says that if the woman conceived after her alienation and gave birth before proceedings began, there is no doubt that the child is not to be handed over; but if she was already pregnant when alienated, it may be said that the child, too, is to be restored. 6. Labeo says that he is not wholly clear on produce growing on the land, whether that the praetor means only that which is already ripe or also that the unripe is included. But even if it be only that which is ripe, this would not add to the obligation to restore the land. For when land is alienated, all pertaining to it and its produce constitute one thing, the land and, whatever the form of its alienation, its produce goes with it. A man who, it being winter, has an estate worth a hundred and who is able around the time of the harvest or vintage to sell the produce for ten is not to be treated as having two assets, the estate worth a hundred and the produce worth ten, but one asset, the estate; in the same way that a man has one asset who sells separately the surface of a built-up site. 7. This action also lies against the defrauder himself; Mela, it is true, thinks that it should not because no action should be given against him in respect of past transactions once his estate has been sold and because it is inequitable that an action should lie against one whose property has been taken from him. But if he should have squandered assets which cannot be recovered by any means, the action will still lie against him, and the praetor will be seen to look not so much to the benefits accruing from the action as to the punishment of the person who has been stripped of his assets.

BOOK FORTY-THREE

1

INTERDICTS OR ACTIONS *EXTRA ORDINEM* IN PLACE OF INTERDICTS

1 ULPIAN, *Edict, book 67:* Let us see to what things interdicts apply. It should be known that they apply to things both divine and human. Divine are such as sacred and religious places. Interdicts with respect to things human apply either to what belongs to somebody or to what belongs to nobody. Belonging to nobody are free persons for whose production, or taking away, interdicts are available. Things belonging to somebody are either public or private property. Public are public places, roads, and publicly owned rivers. Interdicts with respect to private property apply either universally, as does the interdict for *bonorum possessio,* or to individual things, as do the interdicts for the possession of land, or for right of way in person or with cattle. 1. There are three kinds of interdict: for production, prohibition, and restitution. Some are mixed, being both for prohibition and production. 2. Some interdicts refer to the present, some to the past. Referring to the present are those for the possession of land, to the past those for right of way in person or with cattle, and for summer water. 3. All interdicts, although they appear to be drawn up for the thing, have the effect of applying to the person. 4. Some interdicts are for a year; others are perpetual.

2 PAUL, *Edict, book 63:* Some interdicts are double, some are single. Double include the interdict for possession of land, single are others such as those for production and restitution, and again prohibitory ones on cutting of trees and right of way in person and with cattle. 1. Interdicts are in favor either of human beings or of divine law or religion, like the interdicts "to prevent anything from being done in a sacred place," "to make good what has been done," on interment of the dead, or on the building of a tomb. In favor of human beings are those which are for public welfare or for safeguarding rights, duties, or property. Available for public welfare are the interdicts to ensure freedom to use a public way or a public river, and that nothing should be done in a private way. For safeguarding personal rights are the interdicts for the production of children and freedmen. For duty are interdicts requiring the production of a freeman. Other interdicts are granted for the sake of personal property. 2. Some interdicts comprise suits for things, for example, for the restoration of a private way in person or with cattle. For this interdict comprises a case of ownership. But interdicts provided for sacred and religious places also comprise something like a case of ownership, as again do those for the production of children, which we said were for the safeguarding of rights. So no wonder that some interdicts belonging to personal

property also comprise a case of ownership, not possession. 3. Those interdicts which apply to property are either for obtaining or recovering or retaining possession. Interdicts for obtaining possession are those which lie in favor of persons who have not obtained possession before. To this class belong interdicts for *bonorum possessio*. So does the Salvian interdict about pledges; and so is "I forbid the use of force to prevent the buyer using the right of way that was employed by the seller." For recovering possession there are available the interdicts beginning: "where by force"; for some interdicts are under this heading. To interdicts for retaining possession belong those for the possession of land, which are, as we have said, double. There are also double interdicts for both acquiring and retaining possession.

3 ULPIAN, *Edict, book 69:* In interdicts, the fruits are reckoned from the date the interdict is issued, not retrospectively.

4 PAUL, *Edict, book 67:* The reasons for interdicts being for one year, Sabinus replied, also hold good for judgment on what has come into the hands of the defendant to be given after one year.

5 PAUL, *Sabinus, book 13:* Noxal interdicts are those given on account of the offenses of those we have in our power, for instance, when they have demolished something by force or built something by force or stealth. But it belongs to the duty of the judge to release the master if he restores a work at his own expense, or if he submits to the removal of work to direct him to surrender noxally the person-in-power and if he does so to release him, or if he does not, to condemn him to pay the expense incurred in removal. If he does not submit and does not remove the work himself when he could do so, the judge is to condemn him to pay what the cost would have been if he had done it himself.

2

INTERDICTS FOR *BONORUM POSSESSIO*

1 ULPIAN, *Edict, book 67:* The praetor says: "Of the property of which possession has been given to such a one under my edict, you are to restore to him whatever you possess from that property as heir or possessor, or would possess if nothing had been acquired by usucapion, and whatever you have fraudulently arranged to pass from your possession." This interdict is for restitution and applies to the whole property, not to individual things, and is called an interdict for *bonorum possessio* and is for obtaining possession of the whole property.

2 PAUL, *Edict, book 20:* Those in debt to the inheritance are not bound by an interdict for *bonorum possessio*, but only the possessors of tangible objects.

3

INTERDICTS FOR RECOVERY OF LEGACIES

1 ULPIAN, *Edict, book 67:* 1. This interdict is commonly called "for the recovery of legacies." 2. It is for obtaining possession, and its object is that whoever has taken possession of something under pretext of a legacy but against the wish of the heir should restore it to the heir. For the praetor held it to be absolutely fair that nobody should take the law into his own hands by taking possession of legacies, but should claim them from the heir. Therefore, he restores to the heir by this interdict what are possessed as legacies, so that the legatees can then sue him. 3. It should be said that

this interdict is available to the heir of an heir, or *bonorum possessor*, and other successors also on account of its utility. 4. But because it is sometimes uncertain whether someone is in possession of something as legatee, heir, or possessor, Arrian makes the point most neatly that a claim to the inheritance must be made, and the interdict must be granted, so that whether he is in possession as heir, possessor, or legatee, he will be liable in the way we normally act when it is uncertain which of two actions will hold better. For we usually say, when bearing witness to two actions, that we wish to get our due by one or the other. 5. If anyone possesses anything because of a gift given *mortis causa*, the interdict will certainly apply, because the heir automatically retains his share under the *lex Falcidia*, just as tangible objects are transferred in full. 6. Anyone who is in possession of something as a legacy to be taken in advance is certainly liable under this edict, but only for the share which he has by virtue of his legacy, and not also for his share as heir. The same must be said if it is bequeathed to one of the heirs as another kind of legacy; for here too it must be said that the interdict is inapplicable to the share he has as heir. 7. The praetor's words "or has ceased to possess through his fraud" we understand as meaning "has ceased to have the means of restoring." 8. Hence, it has been asked whether, if a usufruct or right of use was left to someone and he has seized it in advance, he should be compelled under this interdict to restore it; what gives rise to the question is that usufruct and right of use are not so much possessed as held. However, it can be argued that the interdict applies, and the same is to be said of a servitude that has been left. 9. If someone is sent to take possession to safeguard legacies, is he liable to make restoration under this interdict? What first gives rise to this question is that in the case of *missio in possessionem* for the safeguarding of legacies, the person sent is not so much a possessor as a custodian, and next, that he has been authorized by the praetor. But it is safer to say that this edict applies, especially if security has already been given for the legacies and he is not withdrawing; for then he is held to be a possessor. 10. We shall say that possession under a legacy does not only fall to the legatee himself but also to his heir and his other successors. 11. The praetor's words "with the consent of the person to whom the thing belongs" are to be interpreted so that, if, after the inheritance is accepted, or *bonorum possessio* obtained, consent has been given to the legatee to take possession the interdict will not apply. But if this is done before the inheritance is accepted or *bonorum possessio* obtained, it will more rightly be said that this consent must be without prejudice. 12. If two articles were bequeathed and one has been taken by consent but the other not by consent, it will follow that one can be recalled but the other not. The same view should be taken in the case of one thing of which part has been taken by consent and the other not by consent; for only a part will be taken away through the interdict. 13. It must be held that there is scope for this interdict where something has begun to be possessed either by you, or by the person to whose place you have succeeded. We understand such succession to be either to an entirety or to a thing. 14. It will always be an advantage to have taken possession with the consent of the owner. Even if the owner's consent has been granted subsequently, it will still be advantageous to the possessor. So if someone has begun to possess something with the consent of the owner, but the consent is afterward withdrawn, this will not prejudice him, since he originally took possession by consent. 15. Of the heirs or owners, if one consented to a thing being possessed by the legatee and the other did not, an interdict lies in favor of the one who did not. It obviously does not lie in favor of the one who consented. 16. The praetor's words "unless security is given" must be understood to mean "unless security continues to be given," so that if the *cautio* is discontinued, the property is to be put into possession for the sake of paying the legacies. 17. I hold security to be given when the security is such that the legatee either acquires a suitable *cautio* thereby, or can do so by action on mandate; and then there will be scope for the interdict. 18. If security is given for some things and not for others, then an unhindered action will be possible for the

things for which security has been given, but not for the rest.

2 PAUL, *Edict, book 63:* It is different if anything has subsequently accrued to a legacy; for those who give security for a legacy are liable for the whole of it. 1. The praetor's words "if it is not for the *bonorum possessor* to give security" we understand to apply if he was prepared to give security. Consequently, he is not obliged to give security, but must not by default obstruct the claimant. 2. Whoever does not make restitution under this interdict is to be condemned to pay the interest. 3. If the legatee was content with a promise of restitution, the interdict should be granted. The same should be said if the legatee refused the furnishing of a *cautio* to him by pledges. 4. If the legatee prevented security from being given, he is bound by the interdict even without a *cautio*. But if it should happen to have been the fault of the legatee that no security was given, but at the time the interdict is issued he is prepared to accept security, the interdict does not lie unless security is given. Again, if it was the fault of the *bonorum possessor* that he did not give security, but he is now prepared to furnish a *cautio*, the interdict holds. For regard is paid to the time of issue of the interdict.

4

TO FORBID THE USE OF FORCE AGAINST SOMEONE SENT TO TAKE POSSESSION

1 ULPIAN, *Edict, book 72:* The praetor says: "If anyone should fraudulently prevent a person from obtaining *bonorum possessio* by my authority, or the authority of the person who had the jurisdiction, I will grant an action *in factum* against him for the value of the property on account of which *missio in possessionem* was authorized." 1. It was with the greatest foresight that the praetor provided this edict. For it would be pointless for him to authorize *missio in possessionem* to safeguard property unless he could protect those sent and coerce those who prevented them from coming into possession. 2. This edict is general; for it applies to all who are sent to take possession by the praetor. For it is right that the praetor should protect all whom he has himself sent to take possession. And those who are sent to take possession, whether for the purpose of safeguarding property or legacies, or in the name of an unborn child, have an *actio in factum* under this edict if owners or others should prevent them. 3. This action holds good not only when someone has prevented somebody from coming into possession but also when somebody has been driven out of possession; nor is it necessary that the person preventing should have done so by force. 4. If somebody has kept someone else from possession because he thought the property to be his own, or pledged to him, or certainly not to be the debtor's, it follows that he will not be liable under this interdict. 5. The words "for the value of the property on account of which *missio in possessionem* was authorized" are serviceable to the creditor in that the value to him of having possession is the amount the person preventing him from possession will be condemned to pay. Consequently, if he is sent to take possession on false pretenses or upon a false claim, or can be removed by a defense, this edict should avail him nothing, because he was sent to take possession without cause. 6. It is settled that a *pupillus* and lunatic cannot be liable under this edict, because they lack steady purpose. But we must understand by a *pupillus* someone who is not capable of fraud. If he is already capable of fraud, the opposite must be held. So if a tutor acts fraudulently, we shall grant an action against the *pupillus*, provided that the tutor is solvent. But Julian writes that a tutor can himself be sued also. 7. If someone is prevented from taking possession at the wish of a master or father, an action will be granted against [these latter] themselves, as having done this through others. 8. It should be known that this action will be available within a year and not subsequently, with the exception of when someone is sent to take possession to safeguard legacies.

For it is penal; and it will not be granted against heirs and similar persons, except for what has come into their hands; but it will be granted in favor of heirs and similar persons. But when someone is prevented from obtaining possession to safeguard legacies or *fideicommissa*, then the action is perpetual and will be granted against the heir, because it is in the power of successors to escape the edict by providing security.

2 PAUL, *Edict, book 59:* It makes no difference whether someone is prevented from taking possession in his own name or another's. For the words "for the value of the property" apply to the person of the owner. 1. Similarly, the person who prevented possession is liable, whether he did so in his own name or another's.

3 ULPIAN, *Edict, book 68:* If someone has been sent to take possession for the purpose of safeguarding a *fideicommissum* and is not admitted, he is to be brought into possession by the power of the person who sent him; or if he wishes to employ the interdict, it will follow that the interdict must be said to lie. But it will be better to say that the authorities themselves should carry out their decree *extra ordinem* by right of their power, sometimes even by military force. 1. A *constitutio* of Antoninus ruled that in certain circumstances someone may even be awarded the goods of an heir. So if he is not admitted to these goods, it must be said that this action effectively lies in his favor. Otherwise, he can have recourse to execution *extra ordinem*. 2. The praetor can send an unborn child to take possession. This interdict is one both of prohibition and restitution. But if the woman wishes to make use of an *actio in factum*, after the manner of creditors, rather than the interdict, it is to be known that she may bring one. 3. If a woman is alleged to have come into possession by reason of a false claim on the grounds that she is not pregnant or not pregnant by such a one, or if something is alleged about the woman's status, then according to a letter of the deified Hadrian in conformity with the presumption of the Carbonian Edict, the praetor promises possession to the unborn child.

4 ULPIAN, *Edict, book 69:* Through an interdict the praetor also comes to the aid of someone whom he has sent to take possession on account of threatened damage, to prevent the use of force against him. 1. The penalty for someone who does not give a promise or security is that his adversary is sent to take possession. So if he gives a promise, or it is not his fault that he does not give one, the interdict will not hold, and the adversary who tries it will be barred by a defense. 2. Against someone who has given no *cautio* and has not allowed the person sent to take possession to take it, the praetor promises judgment for as much as he would have to pay if a *cautio* had been furnished in that matter. 3. But he has provided this action for another reason also, in case, at the time when he wished for *missio in possessionem*, it was impossible to attend the praetor's court, so that if damage was done in the meantime while it was impossible to attend the praetor's court, the sufferer from the damage should have an action. 4. Furthermore, it has been added that if someone sent to take possession is said to have been prevented from taking it for any other reason, he should be entitled to an *actio in factum*.

5

THE PRODUCTION OF DOCUMENTS

1 ULPIAN, *Edict, book 68:* The praetor says: "Such documents as Lucius Titius is said to have left relevant to the question of his will, if these are in your possession or you have fraudulently arranged for them to leave it, you must produce them for such a one. And if any memorandum or anything else is said to have been left, I shall include them in this decree." 1. If anyone should happen to admit that the will is in his possession, he is to be ordered to produce it, and time is to be given him if he cannot produce it at once. But if he says he cannot or should not produce it, this interdict will lie. 2. This interdict applies not only to the documents of the will, but to everything relevant to the question of the will, for instance, a codicil. 3. The will may be valid or may be not, either because it was void from the beginning or broken or defective in some other way. It may even be alleged to be forged or made by someone who had no right to make a will. But it must still be said that the interdict is applicable. 4. Whether the documents are of a last will and testament or of an earlier one, it must be said that the interdict applies. 5. So it must be said that the

interdict refers to every kind of testamentary writing in every way, perfect or imperfect. 6. Furthermore, if there are several testamentary documents because the testator had made his will several times, it must be said that the interdict applies. For everything relevant to the question of the will, whatever it is and whenever made, must be produced. 7. And if there is a dispute about the status of the testator, and he is said to have made the will while a son-in-power or a slave, this will too shall be produced. 8. Again, if a son-in-power has made a will disposing of his *castrense peculium*, the interdict applies. 9. It is the same if the person who made the will has died in the hands of the enemy. 10. This interdict does not apply to the documents of anyone who is alive, because the words of the praetor use the term "left." 11. And if the will has been destroyed without fraudulent intent,

2 PAUL, *Edict, book 64:* either wholly or partly,

3 ULPIAN, *Edict, book 68:* the interdict does not apply. 1. If the documents have been written in several *codices*, they are all included in this interdict, because they are one will. 2. If Titius has deposited the documents of the will with someone else, under this interdict an action lies against both the depositor and the holder. 3. So if a temple guardian or notary took over the custody of the documents, it must be said that he is liable under the interdict. 4. If the documents are in the hands of a slave, his master will be liable under the interdict. 5. If the testator in his lifetime says that the documents are his and wishes them to be produced, there will be no place for this interdict, but an action for their production will lie so that he may vindicate them when produced. This should be held of all who claim corporeal ownership of documents. 6. If anyone has fraudulently arranged for documents not to be in his possession, he shall be liable under this edict all the same. This will not prejudice proceedings under the *lex Cornelia* on wills, for instance, if he fraudulently suppressed the will. For nobody may retain documents on the grounds that he has admitted a more serious offense, when his admission will become the more evident by the production of the documents. And a man may act without fraudulent intent without falling within the scope of the *lex Cornelia*, for instance, if he has neither removed nor hidden the documents, but has handed them to another for the purpose of not producing them to the person availing himself of the interdict, that is, not with the intention or plan of suppressing the will, but so as not to produce it to him. 7. This interdict is for production. 8. Let us see what production is. To produce is to make available the material document itself so that it may be taken hold of. 9. The production should be before the praetor, so that by his authority the signatories may be summoned to acknowledge their seals. And if the witnesses should happen to disobey, Labeo writes that the praetor may coerce them. 10. But it is usual for all who have something written in a will to wish for the production of the documents in all circumstances. 11. Condemnation in a judgment of this kind must be in a sum as great as the interest would have been in the meantime. 12. Therefore, if an appointed heir avails himself of the interdict, the damages must be in proportion to the inheritance. 13. And in the case of a legacy, they are assessed by taking into consideration the amount of the legacy. 14. And in the case of a legacy under a condition, the damages are to be assessed as if the condition were fulfilled, and the legatee will not have to be compelled to furnish a *cautio* to restore what he has obtained if the condition fails, because the person guilty of nonproduction is penalized for his willful disobedience. 15. Hence, the question arises whether a legatee who has obtained damages in this way, and afterward claims the legacy, should be heard. I should think that if the same heir paid him he is to be barred by a defense of fraud, but if another paid him, he should not be barred. And so if it is the heir himself who has had recourse to the interdict and obtained damages, the same distinction applies. 16. This interdict is agreed to apply even after one year. And it lies in favor of the heir and other successors.

4 PAUL, *Edict, book 69:* If the documents are with a *pupillus* and cease to be because of the fraud of his tutor, the interdict lies against the tutor himself. For it is right that he and not his ward should be liable for his own offense.

5 JAVOLENUS, *Cassius, book 13:* The interdict for the production of documents does not apply if a controversy about inheritance depends on them, or if they have a bearing on a public question. In that case, they meanwhile should be deposited in a sacred building or with a suitable man.

6

TO PREVENT ANYTHING FROM BEING DONE IN A SACRED PLACE

1 ULPIAN, *Edict, book 68:* The praetor says: "I forbid doing anything in a sacred place, or introducing anything into it." 1. This interdict applies to a sacred place, not to a sacristy. 2. The praetor's words forbidding the doing of anything in a sacred place apply not to what is done to embellish it, but to its defacement and to nuisance. 3. But the care of sacred buildings and places is mandatory on those who have the charge of them.

2 HERMOGENIAN, *Epitome of Law, book 3:* To do anything to the walls, doors, and other sacred places that will cause damage or nuisance is not permitted.

3 PAUL, *Views, book 5:* The walls and doors may not be used for habitation without permission of the emperor because of the danger of chance fires.

7

PUBLIC PLACES AND WAYS

1 POMPONIUS, *Sabinus, book 30:* It is open to anyone to claim for public use what belongs to the use of all, such as public roads and public ways. Therefore, interdicts are available to safeguard these at anyone's demand.

2 JULIAN, *Digest, book 48:* Nobody may erect a [funerary] monument in a public road.

3 ULPIAN, *Sabinus, book 33:* Local roads established by private contributions of land of which there is no longer any recollection are included among public ways. 1. But between these and other, military roads there is this difference, that military roads terminate at the seashore, in cities, public rivers, or another military road, whereas this is not the case with local roads. For some of these lead into military roads, and others trail off with no way out.

8

TO PREVENT ANYTHING FROM BEING DONE IN PUBLIC PLACES OR WAYS

1 PAUL, *Edict, book 64:* The praetor forbids building in public places and makes an interdict available.

2 ULPIAN, *Edict, book 68:* The praetor says: "You are not to do anything in a public place, or introduce anything into it, which could cause any damage to such a one, except for what has been permitted to you by statute, *senatus consultum*, or edict, or decree of the emperor. Against what has been done I will grant no interdict. 1. This interdict is for prohibition. 2. It provides for both public and private welfare. For public places serve both public and private uses, that is to say, as the property of the

civitas and not of each individual, and we have as much right to enjoy them as anyone of the people has to prevent their misuse. On account of this, if any work should be undertaken in a public place that causes private damage, suit may be brought against it under this prohibitory interdict on account of which thing this interdict is available. 3. The term "public place" should be understood, as defined by Labeo, to apply to public open spaces, tenement buildings, fields, roads, and highways. 4. This interdict does not in my view apply to places within the patrimony of the imperial treasury in which a private person can neither do nor prohibit anything. For the property of the treasury is as it were the private property of the emperor. So if anyone does anything in these, this interdict certainly does not apply. But if there should happen to be any controversy about them, the prefects in charge of them are the judges. 5. This interdict therefore applies to those places which are intended for public use, so that if anything happens there which would harm a private citizen, the praetor may intervene with his interdict. 6. When someone has an awning over his balcony which interferes with his neighbor's light, this interdict may validly lie: "Do not bring anything into a public place which obstructs the light of Gaius Seius." 7. If anyone has something set up in a public place and wishes to repair it, Aristo says that this interdict may be invoked to prevent the repair. 8. Against anyone who has built a breakwater out into the sea this interdict may validly lie in favor of anyone who should happen to be harmed by it. But if nobody is conscious of suffering damage, the person who builds on the shore or throws a breakwater into the sea is to be protected. 9. If anyone is prevented from fishing or navigating in the sea, the interdict will not serve him, any more than it will the person who is prevented from playing on the public sports ground, washing in the public baths, or being a spectator in the theater. In all these cases, an action for injury must be employed. 10. The praetor rightly says: "which could cause any damage to such a one." For whenever anything is allowed to be done in a public place, it should be permitted on condition that it causes no injury to anyone. And the emperor usually gives permission on these terms whenever he is petitioned to allow any new work to be initiated. 11. It is held that damage is suffered by anyone who loses any kind of benefit whatever that he derived from a public place. 12. So if anyone suffers deterioration or restriction of his view or access, there should be recourse to the interdict. 13. If I build something in a public place and consequently the water that used to flow from me to you without your having a right to it ceases to flow, Labeo thinks I am not liable under the interdict. 14. Plainly, if the building results in your tenements receiving less light, this interdict applies. 15. Labeo also says that if I build in a public place and then my building obstructs a building erected by you in a public place, the interdict does not apply, since you too had built illicitly, unless it should be that you built by a right that was granted to you. 16. If someone has obtained a straight permission from the emperor to build in a public place, it is not to be believed that he may build in such a way as to cause inconvenience to anyone; for this is not granted, unless it should be that he obtained this further concession. 17. If someone builds in a public place and nobody prevents him, he cannot then be compelled to demolish, for fear of ruins disfiguring the city and because the interdict is for prohibition, not restitution. But if his building obstructs public use, it must certainly be demolished by the official in charge of public works. If it does not, he must impose a *solarium* (ground-rent) on it. This rent is so called because it is paid for the *solum* (ground). 18. However, if the work has not yet been started, it is the duty of the judge to require a *cautio* that it will not be done. This *cautio* must be fully binding on the persons of the heir and other successors. 19. The case of sacred places is different. In a sacred place, we are not only forbidden to do anything but also are ordered to make restitution: this on account of religion. 20. The praetor says: "I forbid doing or introducing anything in a public road or way by which that road or way is or shall be made worse." 21. We call a road public if its land is public. For our definition of a private road is unlike that of a public road. The land of a private road belongs to

someone else, but the right of going and driving along it is open to us. But the land of a public road is public, bequeathed or marked out, with fixed limits of width, by whoever had the right of making it public, so that the public might walk and travel along it. 22. Some roads are public, some private, some local. We mean by public roads what the Greeks call royal, and our people, praetorian or consular roads. Private roads are what some call agrarian roads. Local roads are those that are in villages or lead to villages. These some call public, which is true, provided that they have not been established by the contribution of land by private persons. It is different if they are repaired by private contributions; for what is repaired by private contributions is by no means private. For this reason the repairs may be communal, because the road is for common use and amenity. 23. Roads are understood to be private in two senses. Either they are roads through fields on which a servitude is imposed so that they may lead to the field of someone else, or they are roads leading to fields through which everyone may travel entered from the consular road, when a road, way, or track leads from it to a farmhouse. Those roads which are entered from the consular road and lead to farmhouses or other settlements I should think are public also. 24. This interdict applies only to rural roads, not to urban. For the care of urban roads belongs to the magistrates. 25. If traffic is excluded from a public road or the road is narrowed, the magistrates intervene. 26. If anyone should bring down a drain into a public road and because of this the road is made less fit for use, Labeo writes that he is liable; for he is held to have introduced [something to make the road worse]. 27. So if anyone digs a cutting in his farm, so that water collects there and runs down into the road, he is liable under this edict; for he too is held to have introduced something. 28. Labeo relates that if someone builds on his own land so that water collects in pools on the road, he is not liable under the interdict, because he is not introducing the water, only failing to collect it. But Nerva writes more correctly that he is liable on both counts. Plainly, if a farm adjoins a road and water coming from the farm makes a road worse, but this water comes from a neighbor's farm to yours, the interdict will apply to the neighbor if you are forced to collect the water, but if you are not, your neighbor will not be liable; for the responsibility will attach to the person who has the use of the water. Nerva also writes that if an action is taken against you under the interdict, you should not be compelled to do more than to join issue with your neighbor at the discretion of the person who sues you. If another view were taken, it would follow that you would be liable even if you had taken action in good faith against your neighbor and had done nothing to prevent your joining issue with your neighbor at the discretion of the person suing you. 29. Nerva also says that if the place becomes unhealthy only because of a bad smell, this does not justify recourse to the interdict. 30. This interdict also applies to damage to the road done by animals grazing in a public road or public way. 31. The praetor's words "by which that road or way is or shall be made worse" mean that the road may be made worse at once or later on. That is the point of the words "is or shall be." For some acts do harm straight away, while others do no harm for the present but are bound to do harm in future. 32. Making a road worse is to be understood to mean impairing its usefulness for traffic, that is, for walking or driving, as when it was level and is made steep, or when it is turned from smooth to rough, from broader to narrower, or from dry to muddy. 33. I know that it has been discussed whether it should be permitted to build a culvert and bridge it with the public road. Most authorities hold that the builder is liable under the interdict; for he ought not to make the road worse. 34. This interdict is perpetual and available to any member of the public. Condemnation is to be determined by the extent of the plaintiff's interest. 35. The praetor says: "You are to make good whatever you have, that is, done or introduced in a public road or way by which that road or way is or shall be made worse." 36. This interdict proceeds from the same cause as the above. The

only difference is that this is for restitution, and that was for prohibition. 37. Under this interdict, it is not the person who did anything in a public road who is liable, but the one who has what has been done. If one person did it and another has what has been done, it is the latter who is liable. And this is more serviceable, because the person who has what is done or introduced is the one who can make it good. 38. When we say he has it, we mean he uses it and enjoys its possession, whether he had the work done himself or acquired it by purchase, lease, legacy, inheritance, or any other way. 39. Hence, Ofilius thinks that someone who has abandoned the work he has done is not liable under this interdict if the work has damaged the public road, because he does not have what he has done. But we shall see whether an action should be granted against him. I think an effective action will lie for him to make good what he built in the public road. 40. If a tree from your farm falls into the public road, and you treat it as abandoned, Labeo writes that you are not liable. But, he says, if the person who sues you is prepared to remove the tree at his expense, he will be right to take an action against you for the repair of a public road. But if you do not treat it as abandoned, an action may rightly be brought against you under the interdict. 41. Labeo also writes that if my neighbor has damaged a road by a work, then even though the work he has done is useful to me as well as to him, I cannot be sued under this interdict. But if we had the work constructed in common, we are both liable. 42. This interdict also applies against anyone who has fraudulently arranged not to possess or have something. For the same provision that applies to someone who possess or has anything should apply to someone who fraudulently arranges not to possess or have something. This opinion of Labeo I consider true. 43. "You are to make good," he says. To make good is to restore to its original condition. This is done by removing what has been constructed or replacing what has been removed, and sometimes at his own expense. For if the person against whom the interdict lies did the work, or ordered it to be done by someone else, or ratified what someone else did, he must restore it at his own expense. But if nothing of the kind took place, but he has what is done, then we shall say that he need only submit to the restoration. 44. It should be known that this interdict is not temporary; for it is a matter of public welfare. And the condemnation under it is to be determined by the extent of the plaintiff's interest in removing what has been done. 45. The praetor says: "I forbid the use of force to prevent anyone walking or driving along a public road or a public way."

3 CELSUS, *Digest, book 39:* The shores over which the Roman people has dominion I consider to belong to the Roman people. 1. The sea, like the air, is for the common use of all mankind. Piles sunk in the sea belong to him who sank them, but this is not to be allowed if the use of the shore or the sea will be impaired in consequence.

4 SCAEVOLA, *Replies, book 5:* He replied that by the law of nations building on the seashore is allowed, unless public use is impeded.

5 PAUL, *Sabinus, book 16:* If a watercourse conducted through a public place should harm a private person, an action will lie in favor of the private person under the *Law of the Twelve Tables* to make good the injury to the owner.

6 JULIAN, *Digest, book 43:* Anyone who avails himself of the interdict "that nothing should be done in a public place to cause damage to a private person," even though the interdict applies to a public place, nevertheless, may employ a procurator.

7 ULPIAN, *Digest, book 48:* Just as anyone who built in a public place when nobody forbade him is not to be compelled to demolish for fear of ruins disfiguring the city, so

anyone who builds in defiance of a praetorial edict must remove the building. Otherwise, the praetor's power would be empty and derisory.

9

ENJOYMENT OF A PUBLIC PLACE

1 ULPIAN, *Edict, book 68:* The praetor says: "I forbid violence to be used to prevent a lessee or his partner from enjoying under the law of lease a public place which he has leased from someone entitled to let it." 1. It is obvious that this interdict is provided for public welfare. For in forbidding force against the lessee it safeguards the public revenue. 2. But if the lessee and his partner both come to invoke the interdict, preference should rather be given to the lessee himself. 3. The praetor says: "to prevent from enjoying under the law of lease." He rightly says: "under the law of lease." For anyone wishing to enjoy beyond the law, or contrary to it, should not be heard.

2 PAUL, *Sentences, book 5:* It is usual to permit public erection of images and statues that will be an ornament to the *res publica.*

10

A PUBLIC STREET AND IF ANYTHING IS SAID TO HAVE BEEN DONE IN IT

1 PAPINIAN, *Care of Cities:* The city overseers are to take care of the streets of the city, so that they are kept level, so that houses are not damaged by overflows, and so that there are bridges where they are needed. 1. And they are to take care that private walls and enclosure walls of houses facing the street are not in bad repair, so that the owners should clean and refurbish them as necessary. If they do not clean or refurbish them, they are to fine them until they make them safe. 2. They are to take care that nobody digs holes in the streets, encumbers them, or builds anything on them. In the case of contravention, a slave may be beaten by anyone who detects him, a freeman must be denounced to the overseers, and the overseers are to fine him according to law and make good the damage. 3. Each person is to keep the public street outside his own house in repair and clean out the open gutters and ensure that no vehicle is prevented from access. Occupiers of rented accommodation must carry out these repairs themselves if the owner fails to do so and deduct their expenses from the rent. 4. They must see to it that nothing is left outside workshops, except for a fuller leaving out clothing to dry, or a carpenter putting out wheels; and these are not by doing so to prevent a vehicle from passing. 5. They are not to allow anyone to fight in the streets, or to fling dung, or to throw out any dead animals or skins.

11

REPAIRING A PUBLIC ROAD AND WAY

1 ULPIAN, *Edict, book 68:* The praetor says: "I forbid the use of force to prevent such a one from opening up or repairing a public road or way, as long as that road or way is not made worse." 1. To open up a road is to restore it to its old depth and breadth.

It is a part of its repair to clean it. Cleaning it is, properly speaking, to reduce it to its proper level by clearing away all that is upon it. Repair includes opening it up and cleaning it and everything that is done to restore it to its original state. 2. If anyone makes the road worse under pretext of repairing it, force can be used against him with impunity. Because of this the employer of the interdict cannot make the road broader or longer, higher or lower, on pretext of repair, or lay gravel on a road, pave a dirt road with stone, or turn a stone-paved road into a dirt road. 3. This interdict will be granted in perpetuity and is open to everyone against anyone and entails condemnation to the extent of the plaintiff's interest.

2 JAVOLENUS, *From Cassius, book 10:* The public cannot lose a public road through nonuse.

3 PAUL, *Sentences, book 1:* If anyone reroutes a public road through his neighbor's field, an action on a rerouted road will only be granted to the extent of the interest of the person whose farm has had injury inflicted upon it. 1. Anyone who plows up a public road is compelled to reconstruct it on his own.

12

RIVERS: TO PREVENT ANYTHING FROM BEING DONE IN A PUBLIC RIVER, OR ON ITS BANK, TO HAMPER NAVIGATION

1 ULPIAN, *Edict, book 68:* The praetor says: "You are not to do anything in a public river or on its bank, nor put anything into a public river or onto its bank, which makes the landing or passage of a boat worse." 1. A river is distinguished from a stream by size, or by the opinion of the surrounding inhabitants. 2. Some rivers are perennial, some torrential. Perennial is what is always flowing, "ever-running" in Greek; torrential is "winter-flowing." But if some rivers should dry up in summer which normally flow perennially, they are nonetheless perennial. 3. Some rivers are public, some not. Cassius defined a public river as a perennial one; this opinion of Cassius, which Celsus also approves, is held to be acceptable. 4. This interdict applies to public rivers. If the river is private, the interdict is inapplicable; for a private river is in no way different from other private places. 5. A bank is rightly defined as that which contains a river when it is holding the line of its natural course. But when a river is sometimes temporarily swollen by rains or the sea or for any other reason, it does not change its banks. No one, after all, has said that the Nile, which covers Egypt with its flood, changes or enlarges its banks. For when it returns to its usual dimensions, the banks of its channel have to be built up. But if a river has grown naturally, so as to acquire a perpetual enlargement, either by admixture with another river or for some other reason, there is no doubt whatever that it has also changed its banks, just as if it had changed its bed and begun to run another course. 6. If an island comes into being in a public river and something is done on the island, it is not held that it is being done on public property. For the island belongs either to the person who first occupies it if the fields have fixed boundaries, or to the person whose bank it adjoins, or if it has come

into being in the middle of the channel, to those who possess each bank nearby. 7. In like manner, if the river has left its bed and takes another course, whatever is done in the old riverbed is not affected by this interdict. For it will not have been done in a public river; for the bed will now belong to each neighbor or, if the fields have fixed boundaries, to the person who first occupies it; it has certainly ceased to be public. And the channel which the river has adopted, even if it was private before, will be public from now on, because it is impossible for the channel of a public river not to be public. 8. A canal dug by hand through which a public river flows becomes public all the same, and so anything that is done in it is held to be done in a public river. 9. But otherwise, if a river floods some land, it will not have made a channel for itself, and then what is covered by water does not become public. 10. Again, if the river surrounds something, it should be known that what it surrounds remains the property of its former owner. So if anything is done there, it is not done in a public river. Anything done on private land, and even in a private river, is unaffected by this interdict; for what is done in a private river is just as if it were done in some other private place. 11. What is done in a public river we take to mean what is done in the water. For if something is done out of the water, it is not done in the river; and what is done on the bank is held not to have been done in the river. 12. But the praetor does not apply coercion to everything that is done in a public river or on its bank, but only to what is done to hamper landing and passage of boats. So this interdict only applies to such public rivers as are navigable, but not to the others. But Labeo writes that it is only fair that if something is done in an unnavigable river to dry it up or impede its course, an interdict should effectively lie "that no force should be used to prevent the removal and demolition of work done in a river channel or bank to impair its course, and the cleaning and restoration of the channel at the discretion of an upright man." 13. We derive "station" from "to stay": therefore that place is indicated where ships can stay in safety. 14. The praetor says: "by which the passage for *navigium* shall be made worse." This word is used instead of *navigatio* (navigation). By *navigium* we normally mean a boat itself, so by "the passage for *navigium*" we also understand "by which the passage for a boat shall be made worse." Under the term *navigium* are included rafts also, because the use of rafts is frequently necessary. If the footway is obstructed, the passage for *navigium* is made worse nonetheless. 15. The landing and passage of boats is held to be made worse if the river's use is impaired or made more difficult or smaller or less frequent or is wholly taken away. So if water is drawn off, so that the river is made smaller and hence less navigable, or if it is widened or spread so as to make the water shallow, or if, on the other hand, it is narrowed and the current is made faster or anything else is done to hamper navigation or to make it more difficult to prevent it altogether, the interdict will apply. 16. Labeo writes that a person sued under the interdict should not be granted the defense "unless it has been done for the upkeep of the bank," but says that the defense should be worded "except for what may have been done that was allowed by law." 17. If anything is done in the sea, Labeo says that this kind of interdict will lie: "to prevent anything being done in the sea or on the shore by which the anchorage, landing, and passage of a boat is made worse." 18. But if it is done even in an unnavigable public river, he thinks the same. 19. Furthermore, the praetor says: "You are to make good whatever you have that is done in a public river or on its bank, or introduced in that river or on its bank, by which the landing or passage of boats is or shall be made worse." 20. The above interdict was for prohibition; this one is for restitution, applying to the same case. 21. Here he who has anything that is done or introduced is directed to make restoration, provided that what he has makes landing or passage of a boat worse. 22. The words "you have that is done" or "that is introduced" show that it is not the person who did

or introduced anything who is liable, but whoever has what is done or introduced. Moreover, Labeo writes that if your agent drew off the water, you are liable under the edict if you use the water.

2 POMPONIUS, *Sabinus, book 34:* Nothing prevents water from being drawn off from a public river (unless the emperor or the senate forbid it), provided that it will not be water in public use. But if the river is navigable or another river derives its navigability from it, it is not permissible to do this.

3 PAUL, *Sabinus, book 16:* Public rivers are those which are always flowing, and their banks are public. 1. A bank is held to be what contains a river at its fullest. 2. Along the banks not all places are public, because the banks begin where the slope first starts to bear down to the water from level ground.

4 SCAEVOLA, *Replies, book 5:* The question arose whether someone who had a house between the two banks of a public river could build a bridge for his private use. He replied that he could not.

13

THAT NOTHING SHOULD BE DONE IN A PUBLIC RIVER WHICH MIGHT CAUSE THE WATER TO FLOW OTHERWISE THAN IT DID LAST SUMMER

1 ULPIAN, *Edict, book 68:* The praetor says: "I forbid anything to be done in a public river or on its bank, or anything to be introduced into a public river or on its bank, which might cause the water to flow otherwise than it did last summer." 1. By this interdict the praetor has made provision against a river's drying up because of unauthorized tapping by watercourses, or bringing any injury to neighbors by changing its bed. 2. It applies to public rivers, navigable and unnavigable. 3. The praetor says: "which might cause the water to flow otherwise than it did last summer." So not everyone who introduced or did something is liable, but only one who by doing or introducing something causes the river to flow otherwise than it did last summer. The words "flow otherwise" do not refer to the volume of the water, but to the manner and direction of its current. So it is generally to be said that someone is liable under the interdict if what he has done changes the current by making the water deeper, or narrower and hence swifter, to the inconvenience of the neighborhood. And if the neighbors suffer some other harm because of what the person has done, the interdict will apply. 4. If anyone wishes to conduct water from a covered watercourse through an open channel or, on the other hand, wishes to conduct through a covered watercourse what he conducted through an open channel before, it is held that he is liable under the interdict in the event of this action of his bringing inconvenience to those living around it. 5. In the same way, if he digs an *incile* (cutting) or transfers one to another site or changes the bed of the river, he will be liable under this interdict. 6. There are some who think that to this interdict a defense can be made too, namely, "if it is not done for building up its banks," on the supposed ground that if something is done to cause the water to flow otherwise, there is no scope for the interdict if it is done for building up the bank. But others do not accept this, as not even banks are to be built up at the cost of inconvenience to those living around. But we follow the practice of having the praetor decide from the case whether he should grant this defense; for convenience often dictates that it should be granted. 7. But if attention is drawn to the convenience of the person who did something in a public river (suppose, for example, heavy damage has commonly been caused him by the river, and lands devastated) and if he built up dikes and other protections to safeguard his fields and this has caused some change to the river's course, should not his interest be consulted? I understand that many have diverted rivers altogether and changed their beds for the good of their lands. In matters of this kind, it is right to take into account the convenience and safety of the doer, but only if he does no injury to those living around. 8. The interdict

renders liable anyone who has caused a river to flow otherwise than it flowed last summer. They say that the praetor included last summer, because the natural course of a river is always more certain in summer than winter. The interdict refers not to summer of this year, but to last summer, because the flow of that summer is less open to doubt. Summer extends to the autumn equinox. If the interdict should be issued in the summer, the nearest summer before that is meant; but if in winter, reference should be made not to the nearest summer before that winter, but to the one before that. 9. This interdict is available to any member of the public, but not against anyone, only against someone who has caused the water to flow otherwise, when he had no right to do so. 10. This interdict lies against heirs also. 11. The praetor furthermore says: "You must restore what you have that is done in a public river or on its bank, or inserted into that river or on its bank, if because of this the water flows otherwise than it flowed last summer." 12. This interdict is provided for restitution. For the interdict above is for prohibition and applies to what has not yet been done. So if anything has been done already, it is made good through this interdict. If provision is being made to prevent anything from being done, the interdict above must be employed by which he will be coerced if anything is done after the interdict is issued. 13. It is only fair, as Labeo writes, that this interdict for restitution should include anything which you have arranged with fraudulent intent not to have.

14

TO ALLOW NAVIGATION IN A PUBLIC RIVER

1 ULPIAN, *Edict, book 68:* The praetor says: "I forbid the use of force against such a one to prevent him from traveling in a boat or raft in a public river, or loading or unloading on its bank. I will also ensure by interdict that he be allowed to navigate a public lake, canal, or pool." 1. This interdict provides that nobody should be prevented from navigating in a public river; for just as an interdict has been provided above to protect someone who is prevented from using a public road, so the praetor thought one should be provided in this case too. 2. If the above-written should be private, the interdict does not apply. 3. A lake is what has water perpetually. 4. A pool contains water for the time being which is stagnant. This kind of water usually collects in winter. 5. A canal is a receptacle for water dug by human hands. 6. These can all be public too. 7. If a contractor who has taken a lease of a lake or pool is prevented from fishing, Sabinus agreed that it is plain that the interdict will effectively lie, as did Labeo. So if he has leased it from a municipality, it will be quite right to protect him by the interdict for the sake of the revenue. 8. If someone wishes to invoke an interdict of this kind so as to sink a place for watering herd animals, he should not be heard; and so Mela writes. 9. Mela also says that an interdict of this kind lies to prevent the use of force to stop herd animals from being watered in a public river or on the bank of a public river.

15

BUILDING-UP A BANK

1 ULPIAN, *Edict, book 68:* The praetor says: "I forbid the use of force to prevent such

a one from doing any work in a public river or on its bank for the purpose of protecting the bank or the field which adjoins the bank, provided that navigation is not made worse by it, if a *cautio* or security is given to you for ten years for threatened damage at the discretion of an upright man, or if it is not the fault of such a one that no *cautio* or security is given at the discretion of an upright man." 1. It is extremely useful to repair and build up the banks of public rivers. So just as an interdict is provided for the repair of a public road, another had to be provided for building up the bank of a river. 2. He rightly adds: "provided that navigation is not made worse by it"; for only such repair is allowable as offers no hindrance to boats. 3. He who wishes to build up the bank must give a *cautio* or security for future damage according to what sort of person is concerned, and it is expressed in this interdict that for any damage done a *cautio* or security must be given for ten years at the discretion of an upright man. 4. Security will be given to neighbors, including those who have possessions on the other side of the river. 5. Care must be taken that *cautiones* are furnished to these people before the work is done. For after it has been done, there will be no more opportunity for prosecution under this interdict, even if some damage is occasioned afterward, but recourse must be had to the *lex Aquilia*. 6. It is to be noted that the praetor has made no provision in this interdict for the building up of the bank of a lake, canal, or pool. But the same rules are to be observed as for the building up of a riverbank.

16

FORCE AND ARMED FORCE

1 ULPIAN, *Edict, book 69:* The praetor says: "Where by force you, or your staff of slaves, have ejected such a one, I will grant a judgment about that place within a year with respect to what he had there then, and after a year with respect to what has come into the hands of the person who forcibly ejected him." 1. This interdict is provided for anyone who has been forcibly ejected. It was absolutely right to come to the help of the forcibly ejected; hence, this interdict is provided for recovering possession. 2. To prevent anything from being done by force, provision is made under the *leges Juliae* for public and private cases, and also under imperial *constitutiones*. 3. This interdict does not apply to all force, but to those who are ejected from possession. This interdict applies only to this atrocious use of force and only to those who are ejected from the land, for instance, from farms or buildings, and to no one else. 4. And if anyone is ejected from an undeveloped site, the interdict will undoubtedly apply. In general, the interdict applies to all who are ejected from property attached to the land; and the interdict has scope whatever the kind of place it is from which he was forcibly ejected. 5. If it is a superficiary tenement building from which someone has been ejected, the interdict will also apply. 6. It will certainly not be doubted that this interdict is inapplicable to movable things. For actions are available on the grounds of theft, or goods taken by force, and actions can be brought for production. Plainly, if there are things in the farm or house from where someone has been ejected, the interdict will unquestionably apply to them. 7. If anyone is forcibly ejected from a boat, this interdict will not apply, by analogy with forcible expulsion from a vehicle, where nobody says this interdict is to be employed. 8. Plainly, if someone is ejected from a wooden house, nobody will hesitate to say that the interdict will apply, because whatever it is that is attached to the land, anyone forcibly ejected from it can resort to the interdict. 9. To be ejected, a person must be a possessor under either civil or natural law; for natural possession offers grounds for this interdict also. 10. Moreover, if a husband donated property to his wife and she is ejected, she will be able to avail herself of the interdict, though a tenant cannot. 11. The praetor says: "You, or your

staff of slaves, have ejected." The staff has rightly been mentioned. For the expression "you have ejected" refers to the person of the ejector, and not to him whose staff did the ejecting; for I am not held to have ejected if it was my staff that did so. So "or your staff of slaves" is an appropriate addition. 12. He is held to have ejected who gave a mandate or order that someone should be ejected. For it has been held to make little difference whether someone ejects with his own hands or through someone else. So if my staff of slaves eject at my wish, I am held to have ejected. 13. If the ejection was carried out by a duly authorized procurator, Sabinus says an action may be brought against either of them, that is, either the master or the procurator, and one is to be released by a judgment against the other, provided that the other pays the damages assessed (for to have ejected by the order of someone else is no excuse, any more than is killing by order of someone else). But when someone has falsely claimed to be a procurator, the interdict lies against the [so-called] procurator only. This opinion of Sabinus is true. 14. But also if I ratify the ejection by someone else, there are those who follow Sabinus and Cassius in thinking ratification comparable to mandate, and so consider that I am held to have ejected and am liable under this interdict, which is true. For it is rightly said that in an offense ratification is comparable to mandate. 15. The words "or your staff of slaves have ejected" are rightly added to cover the case of my staff of slaves carrying out a forcible ejection. The master should not object if he pays for what is done by his slaves, even if they carried out the ejection without his command; for either something has come into his hands and he can make restitution, or it has not, and he will be freed from liability by surrendering the slaves noxally by reason of their offense. For what he is compelled to surrender noxally he should not count as loss, since by this a slave can worsen his master's condition. 16. The term *familia* (staff of slaves) includes slaves. 17. But what number of slaves does it include? Two or three or more? The better opinion is that under this interdict, even if the forcible ejection was the work of one slave, it is held to be that of a staff of slaves. 18. It should be said that under the term *familia* even those whom we have in place of slaves should be included. 19. If someone should refuse to defend his slave or staff of slaves, he must be compelled to submit to the interdict, at least so as to restore what has come into his hands. 20. If a son-in-power or a paid servant has carried out the forcible ejection, the interdict effectively applies. 21. If I avail myself of the interdict against someone whose freedom is being claimed out of slavery or vice-versa after the action on his freedom has begun and he is adjudged free and it appears that I have been forcibly ejected by his slaves without his knowledge, I shall be restored to possession. 22. What is held by a slave, agent, or tenant is considered to be possessed by the master, and so when these are ejected, he is considered to be ejected from possession, even if he does not know that those through whom he held possession have been ejected. And if anyone else through whom I held possession is ejected, no one will doubt that the interdict lies in my favor. 23. This interdict lies in favor of no one but the person who was in possession at the time of his ejection, and no one is held to be ejected except the person in possession. 24. Whether the ejected person was a possessor physically or in mind, it is obvious that he is held to have been forcibly

ejected. And so if someone had gone away from his field or his house leaving none of his household there, and on his return either was prevented from entering the premises themselves or was detained in mid-journey by someone who took possession himself, he is held to have been forcibly ejected. For you have deprived him of the possession of what he was holding in mind if not physically. 25. I have learned that Proculus used to give as an example the common saying that we hold our possessions of summer and winter pastures in mind. For the same applies to all property in land from which we have withdrawn without the intention of abandoning their possession. 26. Someone who held no possession either in mind or physically, but who is prevented from entering and taking possession, is not held to have been ejected, according to the better opinion. For ejection means losing possession, not non-admission. 27. Cassius writes that it is permissible to repel force by force, and this right is conferred by nature. From this it appears, he says, that arms may be repelled by arms. 28. A person is to be defined as possessing by force, if after expelling the old possessor he occupies a possession acquired by force, or if he comes equipped and prepared, and contrary to sound morals takes measures to ensure that he cannot be prevented from taking possession. But anyone who uses force to retain his own possession is not, Labeo says, possessing it by force. 29. Labeo also says that anyone who flees in terror of a crowd is held to have been ejected by force. But Pomponius says that force does not take effect without bodily force. So the person who is put to flight by certain people coming upon him is held to have been forcibly ejected if they take hold of his possession by force. 30. Anyone who took possession from me by force can resort to the interdict if he is ejected by someone else. 31. Whoever has been forcibly ejected must recover whatever damage he has sustained on account of his ejection; for he must be replaced in the original state in which he would have been if he had not been ejected. 32. If the farm from which I was forcibly ejected is restored to me but other things which were taken away by force are not, the interdict is to be said to hold good here nonetheless, since it is true that I was forcibly dispossessed of them. Plainly, if someone wishes to avail himself of this interdict to get the possession of property in land and of an action for production for movables, he may use his discretion. So Julian also writes, and he adds that he may also avail himself of an action for goods taken by force. 33. The praetor's words "what he had there" we take to include all the things, not only his own but anything deposited, lent, or pledged, and of which he had the use, usufruct or custody, and anything hired to him. For when the praetor says "had," every kind of having is included in the word. 34. The praetor has quite rightly added: "had there then." "Then" we take to mean "when he was ejected." So even if something has subsequently ceased to be there, it is to be said that it comes under the interdict. So it comes about that if men or herd animals have died since the ejection, there will also be grounds for the interdict. 35. Furthermore, Julian writes that it is likely that anyone who carried out a forcible

ejection from lands in which there were men, should be obliged by the interdict to restore the value of men who have died even if he was not to blame, just as a robber is liable for a man he has kidnapped after the man's death. It follows from this, Julian says, that he will be compelled to pay the price of a farmhouse and buildings destroyed by fire. For, he says, when someone has carried out a forcible ejection, any inadequate restitution is held to be his fault. 36. Therefore, it follows, he says, that anyone who has forcibly ejected is liable under the interdict even when he has given up possession without fraud. 37. "There," says the praetor, so that nobody may include what he did not have there. 38. In what sense are we to understand the word "there" as used by the praetor? Does it mean in the exact place from which he was forcibly ejected, or in the whole possession? It will be better said not to refer to the corner or place in which he was when he was ejected, but to all that part if his possession of which he was deprived. 39. The year, in this interdict, in an *annus utilis*. 40. The reckoning of the fruits is made from the day of ejection, although in other interdicts the days are counted from the issuing of the interdict and not retrospectively. The same applies to the movables that were there; for their fruits are also to be reckoned up from the day of ejection. 41. But under this interdict a reckoning is made not only of the fruits but of other benefits. For Vivianus says that under this interdict everything that the person ejected would have had or obtained, if he had not been ejected, must be restored, or damages for them assessed by the judge; and he is to get as much as his interest would have been if he had not been forcibly ejected. 42. Under the interdict "where by force" even a nonpossessor will be compelled to make restitution. 43. Because this interdict implies an atrocious misdeed, it has been asked whether it lies in favor of a freedman against his patron, or of children against parents. The better opinion is that it should not be granted to a freedman against his patron or to children against parents, and it will be better for an *actio in factum* to be available for them. It is another matter if a patron has used armed force against a freedman, or a parent against children. Here the interdict will lie. 44. This interdict is available to the heir and other successors. 45. That the interdict "where by force" lies in favor of none other than the possessor is argued for by the fact that Vivianus states that if I am ejected by force, but my household is not, I cannot avail myself of the interdict, because I retain possession through those who have not been ejected. 46. Vivanus also reports: A man ejected some slaves by force, retained others and bound them, or gave them orders. You are understood to be forcibly ejected; for you have lost possession when the slaves are possessed by another. And what is said of a part of the slaves applies to them all, if it so happens that no one was driven out but they were taken into possession by the man who seized possession. 47. He discusses what we should say if, when someone is in possession, I seize possession and do not eject the possessor, but bind him and force him to work. He asks: How would this be? I think the better opinion would be that the person bound there should also be held to have been ejected. 48. Under this interdict, an *actio in factum* is available against the heir, *bonorum possessor*, and other successors for what has come to them,

2 PAUL, *Edict, book 65:* or what they have fraudulently arranged not to come to them.

3 ULPIAN, *Edict, book 69:* This is the case also if someone has been ejected by arms, because an action is granted against the heir for what has come to him from the misdeeds of the deceased. For it is enough that the heir of such a person should not profit from them. He need not also undergo loss. 1. This action which lies against the heir and the other successors is perpetually available, as it involves suing for a thing. 2. How do we define ejection by arms? Arms are all weapons, that is, not only swords, spears, and lances, but also sticks and stones. 3. Plainly if one or another held a stick or a sword, the possessor is considered to have been ejected by arms. 4. One must go further and say that even if they came unarmed, but got to the point of taking up sticks and stones, it will be armed force. 5. Those who came armed but did not use arms for the ejection, yet did eject, are held to have done so with armed force. For terrorizing by arms is enough to be held as ejection by arms. 6. If someone on the sight of armed men going elsewhere grew so frightened that he fled for fear, he is not held to have been ejected, because the armed men had no such intention but were on the way to somewhere else. 7. And so if on hearing armed men come he abandoned his possession from fear, then, whether he got a true or false impression, he is to be said not to have been ejected by arms unless possession was first taken over by them. 8. But if, when the owner was entering his possession, armed men who had broken in prevented him from possession, he is to be held to have been ejected by arms. 9. Anyone who comes with arms we may repel with arms. But this must be at once and not after an interval. We should know that it is not only permissible to resist ejection, but that even if someone is ejected, he may eject in his turn, as long as this is immediately and not after an interval. 10. When a procurator comes armed, the master himself is held to have carried out an ejection by arms, whether he mandated or, as Julian adds, ratified the ejection. 11. This is to be said of a staff of slaves. For when my staff comes armed without me, it is not I who am held to have come, but my staff unless by my orders or with my ratification. 12. This interdict is also provided against anyone who by fraud ensures that someone is ejected by arms; and after a year it will be granted for what may have come into the hands of him who used force to prevent entry or eject. 13. It is evident that an interdict will be necessary for the holder of a usufruct "if he is prevented from using and enjoying the usufruct of a farm." 14. Preventing someone from using and enjoying is held to be ejecting him forcibly from the usufruct, or not admitting him back when he has left the farm with no intention of abandoning the usufruct. But if someone stopped him from the outset when he wished to take up the usufruct, this interdict has no scope. What then? The usufructuary must vindicate the usufruct. 15. This interdict is available to someone who is prevented from using and enjoying a farm, but it is also available to anyone who is prevented from using and enjoying a building. We shall be consistent in saying that this interdict does not apply to movable things, if anyone is prevented from using and enjoying anything movable, unless the movable things were accessory to property in land. If they were there, it is to be said that this interdict is also to be referred to them. 16. Again, if it was not the usufruct, but the use that was left, this interdict is applicable. So from whatever cause a usufruct or a use has been established, this interdict will have scope. 17. Anyone who has been as it were in possession under a usufruct in any way whatever will be able to avail himself of this interdict. But if anyone after being prevented should suffer change of civil status or die, it is rightly said that his heirs and successors may avail themselves of this interdict, not so that the usufruct may be established for the future, but to get compensation for what was done and the damage that was sustained in the past. 18. An heir will also have to be similarly answerable to an *actio in factum* for what has come into his hands.

4 ULPIAN, *Edict, book 10:* If anyone has ejected me by force on behalf of a municipality, Pomponius writes that an interdict is to be granted to me against the municipality if anything has come into its hands.

5 ULPIAN, *Edict, book 11:* If I am forced to deliver a possession to you, Pomponius says that the interdict "where by force" is inapplicable, because he who is compelled to install someone in possession is not ejected.

6 PAUL, *Edict, book 17:* Under the interdict "where by force" condemnation is to be made in a sum to the extent of the possessor's interest. Pomponius writes that we follow this practice, that is, that a thing is held equal to the plaintiff's interest. This, he says, is sometimes less, sometimes more; for it is often more in the interest of the plaintiff to keep a man than his value, for instance, when it is in his interest to keep him for putting him to the question, proving something, or accepting an inheritance.

7 PAUL, *Edict, book 24:* When I have been forcibly ejected by you, then if Titius has taken possession of the same property, I cannot avail myself of the interdict against anyone other than yourself.

8 PAUL, *Edict, book 54:* Fulcinius used to say that whenever someone has been forcibly ejected, even if not the owner, it is a case of forcible possession if he was in possession.

9 PAUL, *Edict, book 65:* If there are several heirs, each of them is liable for no more than what has come into his hands. For this reason an heir into whose hands the whole has come is sometimes liable in full, even though he is part heir. 1. The praetor orders one who has been ejected from the usufruct to be restored to the same condition, that is, the condition in which he would be if he had not been ejected. Therefore, if the usufruct would have come to an end in time after his ejection by the owner, nevertheless, he will have to be compelled to make restitution, that is, re-establish the usufruct.

10 GAIUS, *Praetor's Edict, book 2, Chapter on Freedom:* When an unlawful occupant expels the proprietor and the usufructuary from a farm and on account of this the usufructuary does not use it in the prescribed time and loses his right, the owner will indubitably keep the usufruct that has reverted to him, whether or not he takes issue together with the usufructuary against the unlawful occupant. What the usufructuary has lost will belong to the damages due from the person whose act caused the loss.

11 POMPONIUS, *From Plautius, book 6:* Force is not allowing the possessor to exercise his free will in the use of what he would possess, either in sowing or digging or plowing or building or doing anything which does not leave free possession to his adversary.

12 MARCELLUS, *Digest, book 19:* A tenant did not admit someone to whom the landlord had sold the farm, when sent to take possession. Afterward the tenant was forcibly ejected by someone else. The question was: Who could avail himself of the interdict "where by force"? I said it makes no difference whether the tenant had prevented the owner when he wished to enter, or the buyer to whom the owner had ordered the possession to be delivered. Therefore, an interdict "where by force" would lie in favor of the tenant, and the tenant would be liable under a similar interdict to the landlord, whom he would be held to have ejected at the time when he did not deliver possession to the buyer, unless it should be that he did this for a good and justifiable reason.

13 ULPIAN, *Sabinus, book 8:* "Where by force" implies no *infamia*, nor does any other interdict.

14 POMPONIUS, *Sabinus, book 29:* If you are ejected by armed force, then just as you get back the farm itself, even if you had possessed it by force or stealth or *precarium*, you will also by all means get back the movable things.

15 PAUL, *Sabinus, book 13:* If you have ejected me forcibly or have by force or stealth caused me to be ejected, then even though you should lose possession without fraud and fault, nevertheless, you are to be condemned in a sum to the extent of my interest, because you were at fault in the first place by the very fact that you forcibly ejected me, or by force or stealth caused me to be ejected.

16 ULPIAN, *Edict, book 29:* In an interdict "where by force," it is to be said that a father is liable for anything that has come into his hands on that account.

17 JULIAN, *Digest, book 48:* Someone who recovers by force in the same conflict a possession of which he has been forcibly deprived is to be understood as reverting to his original condition rather than possessing it by force. So if I eject you and you immediately eject me, and I then eject you, the interdict "where by force" will lie effectively in your favor.

18 PAPINIAN, *Questions, book 26:* The landlord of a farm sold it and directed the buyer to take up the vacant possession. His tenant prevented the buyer from entering. Afterward the buyer forcibly expelled the tenant. The question was about interdicts "where by force." It was held that the tenant was liable to the seller under the interdict, because it made no difference whether he prevented the seller himself or someone else sent by his wish from entering. For possession was not held to have been lost before it was delivered to the buyer, since no one is minded to lose on account of a buyer a possession which the buyer has not taken over. The buyer who subsequently applied force is also liable himself under the interdict to the tenant; for it was possessed not by him but by the seller, who had been deprived of possession. The question was, whether one should come to the buyer's aid, if it was by the wish of the seller that he afterward forcibly expelled the tenant. I said that one should not come to the aid of anyone who had carried out an illegal mandate. 1. It was held that someone who vindicated a farm from a person with whom he could take issue under the interdict "where by force" would, while the judgment was pending, nevertheless be right to bring an action under the interdict.

19 TRYPHONINUS, *Disputations, book 15:* Julian rightly replied that if you have forcibly ejected me from a farm in which there were movable things, since under the interdict "where by force" you should restore to me possession not only of the land but of what had been there, then even though I should have delayed suing you under the interdict, you still have the burden of making restitution for slaves who have meanwhile been lost by death, or herd animals or other things which have been accidentally lost, because you are held to be the debtor from the very time of your offense more than I am in causing delay.

20 LABEO, *Plausible views, book 3:* If your tenant is forcibly ejected, you will take action under the interdict "where by force." The same applies if your lodger has been forcibly ejected. PAUL: The same can be said of a tenant or lodger to whom your tenant or lodger has sublet.

17

THE POSSESSION OF LAND

1 ULPIAN, *Edict, book 69:* The praetor says: "Insofar as you do not possess the house in question by force or stealth or *precarium* the one from another, I forbid the use of force for you so to possess it. I will not give this interdict for drains, or for more than the property is worth. I will permit proceedings within a year from when it is first

possible to bring one." 1. This interdict is written with respect to the person whom the praetor has as the preferred possessor of the land, and it is prohibitory, for keeping possession. 2. The reason for providing this interdict was that possession should be kept separate from ownership. For it may happen that one person is a possessor but not an owner, the other an owner but not a possessor; and it may be that the same person is both possessor and owner. 3. Now whenever there is a controversy between litigants about ownership, it is either agreed between the litigants who is the possessor and who the claimant, or it is not agreed. If it is, there is an end of the matter; the one who is agreed to be in possession enjoys the benefit of possession, and the other has the burden of claim. But if there is dispute about who is the possessor, because each affirms that he is more in possession, they are referred to this interdict. 4. So this interdict, commonly called "for the possession of land," is for keeping possession (for it is given in order to prevent force against the possessor), and is logically provided after an interdict "where by force." For that interdict restores possession that has been lost by force, but by this interdict the praetor forbids force to be used so that possession is not lost. The first interdict, then, attacks the possessor; the second protects him. And, as Pedius says, every controversy about possession is either for restitution to us for what we do not possess, or retention by us of what we do. Restitution of possession is achieved by interdict or by action. The method of retaining possession is double, either by defense or by interdict. A defense is granted to the possessor for many reasons. 5. The following words are always included in the interdict: "What you do not possess by force or stealth or *precarium* from such a one." 6. The interdict for the possession of land also protects the possessor of a landed estate. For no further action is ever granted to a possessor, since what he possesses is enough for him. 7. This interdict applies, whether someone says that he possesses the whole farm, or a certain part, or [, as joint possessor,] its undivided extent. 8. This interdict will undoubtedly apply to all possessions attached to the land provided that they can be possessed. 9. The point of the praetor's words in the interdict "you do not possess by force or stealth or *precarium* from such a one" is that if someone possesses something by force or stealth or *precarium* from someone else, his possession should be of advantage to him, but if from his adversary, he should not win on account of what he possesses from him. For it is obvious that such possessions should not bring any advantage.

2 PAUL, *Edict, book 65:* It makes no difference in this interdict whether the possession against others is just or unjust. For every kind of possessor has by virtue of being a possessor more right than the nonpossessor.

3 ULPIAN, *Edict, book 69:* If two should be fully in possession, let us see what is to be said. We must consider how the matter will proceed if someone puts the case of a just and unjust possession. I possess for just cause, you by force or stealth. If you possess from me, I prevail by the interdict; if not from me, neither of us is defeated, because both you and I are possessors. 1. This interdict is double, and those in whose favor it lies can be both plaintiffs and defendants. 2. This interdict is enough for anyone who is prevented from building on his own land. For by preventing me from making use of what I possess you are held to be disputing my possession. 3. When a lodger prevented the owner who was wishing to repair his house, it was held that an interdict for the possession of land will equally apply and that the owner should declare before witnesses that he was not preventing the lodger from residence but from possession. 4. Again, let us see what the law is if your neighbor's agent carries over vines from your land to his trees. Pomponius says you may give him notice and cut short the vines, and Labeo writes the same; or you may avail yourself of the interdict for the possession of land with respect to the place containing the roots of the vines. For if he

brings force to bear against your cutting short or carrying back the vines, he will be held to be forcibly preventing you from possession; since anyone who is prevented from cultivating a farm is, as Pomponius says, prevented from possessing it. 5. Again, let us see whether, if an extension projecting over a neighbor's ground is said to be without any right, the one may effectively avail himself of the interdict for the possession of land against the other. A statement in Cassius is that it is effective for each, because the one possesses the ground and the other the *superficies* with the building. 6. Labeo also writes: I have part of my house projecting over yours. You invoke the interdict against me, if we possess the place covered by the projection. Shall I, the more easily to keep possession of the projection, invoke against you the interdict "insofar as you now possess the house from which there is a projection?" 7. But if above the house which I possess there is an upstairs apartment in which someone else is residing as if he were its owner, Labeo says that the interdict is available to me but not to the resident in the upstairs apartment; for the *superficies* always yields place to the land. Plainly, if an upstairs apartment has the entrance from the public [street], Labeo says the house is possessed not by the possessor of the hidden part, but by the person whose house is above it. This is true of him who has the entrance from the public [street]; otherwise, he will make use of the interdict proper to superficiaries and actions granted by the praetor. But the owner of the ground will be preferred under the interdict for the possession of land against a superficiary as against anyone else. However, the praetor will protect the superficiary according to the law of letting, as Pomponius confirms. 8. Creditors sent to take possession so as to safeguard the property may not employ the interdict for possession of land; and rightly, since they are not the possessors. And the same is to be said of all who are sent to take possession for the purpose of custody. 9. If my neighbor's plastering partly covers my wall and partly his, the interdict for possession of land is effective to make him remove it. 10. I am not held to be in forcible possession if I accept a farm from someone I know is in forcible possession. 11. In this interdict condemnation is in a sum related to the value of the property. By "the value of the property" we understand "the extent of anyone's interest in keeping possession." There is admittedly an opinion of Servius's that the possession should be valued as being as much as the property itself is worth. But that is by no means to be held. For the price of a thing is far from being that of its possession, which is quite a different thing.

4 ULPIAN, *Edict, book 70:* In sum, I think it is to be said that this interdict can be granted between usufructuaries also, and if one party is arguing for his usufruct and the other for possession. The same is to be affirmed if someone is arguing for his possession of the right of use, and so Pomponius writes. So if one party is seeking his right of use and the other his right to the fruits, this interdict is to be granted to them also.

18

SUPERFICIES

1 ULPIAN, *Edict, book 70:* The praetor says: "Insofar as under the law of letting or lease of the *superficies* in question you are enjoying not by force, stealth, or *precarium* the one from the other, I forbid the use of force to prevent you from enjoying

it. If any other action on *superficies* is demanded, I will grant it upon cause shown." 1. Whoever has the *superficies* of the ground of someone else relies on a civil action. For if he rented or bought it, he can take action against the landlord or seller who owns the ground. And so if the owner prevents him, he will obtain the extent of his interest by bringing an action; if he is prevented by someone else, the owner must deliver and cede to him his rights of action. But because it was uncertain whether evidence of the lease existed, and because it is better to be in possession than to sue personally, it was held most advantageous to provide this interdict and so promise what amounts to an action for the thing. 2. The interdict provided is double, on the model of the interdict for the possession of land. The praetor protects the person claiming *superficies* without exacting from him an account of his case for possession. His only requirement is that he should not happen to have possession by force, fraud, or *precarium* from his adversary. And all the provisos of the interdict for possession of land apply here also. 3. The praetor's words "if any other action on *superficies* is demanded, I will grant it upon cause shown" are to be understood to mean that if someone has taken a temporary lease on *superficies*, he will be refused an action for the thing. However, if he has taken a lease of *superficies* not just for a short time, an action for the thing will lie. 4. But the person on whose land the *superficies* is by no means lacks an *utilis actio*. He has an action for the thing insofar as he has it for the land. Plainly, if he wishes to vindicate against the superficiary, it is to be said that he may avail himself of the grant of a defense *in factum*. For when we grant an action to anyone, he will be considered all the more entitled to a defense. 5. If the possessor of the land is evicted from the *superficies*, it will be entirely just to come to his aid either with an action on stipulation on account of the eviction, or at any rate with an action on sale. 6. And because an action for the thing will be granted on account of *superficies*, it must be held that a creditor should be granted an action for *superficies* and that what amounts to a kind of usufruct or right of use can exist and be established for him by *utiles actiones*. 7. Moreover, it must be understood that this can be delivered, just as it can be bequeathed and given. 8. And if it is common to two, we shall also grant an *utile judicium* for its common division. 9. Servitudes too are established by praetorian law, and they can be claimed through *utiles actiones* on the model of those established by civil law. An interdict effectively lies for these also.

2 GAIUS, *Provincial Edict, book 25:* We mean by superficiary buildings those that are sited on leased land. By both civil and natural law their ownership belongs to the owner of the land.

19

PRIVATE RIGHT OF WAY IN PERSON AND WITH CATTLE

1 ULPIAN, *Edict, book 70:* The praetor says: "I forbid the use of force to prevent you from using the private right of way in person or with cattle that is in question, which you have used this year not by force or stealth or *precarium* from such a one." 1. This interdict is for prohibition. Its object is the protection of only rural servitudes. 2. In this interdict the praetor does not inquire whether or not he had the servitude lawfully imposed, but only whether he used it this year, not by force or stealth or *precarium*; and he protects him even if he did not use it at the time the interdict was issued. Whether he was entitled to the right of way or not, he qualifies for the praetor's protection provided that he used it this year even for a short time,

that is, not less than thirty days. The use is not referred to the present time because there are often ways or roads which we do not always use unless practice demands it. 3. The use is concluded by the space of a year's time. We must reckon the year back from the day of the interdict. 4. If anyone should avail himself of this interdict, it is enough to prove that he had one or the other, that is to say, the way in person or by cattle, in use. 5. Julian says that the interdict applies in his favor for as far along the way as he went, which is true. 6. Vivianus rightly says that someone who, because of the inconvenience of a stream or because a public road was blocked, made his way across his neighbor's field, even if he did so often, is not held altogether to have used it, and so the interdict is inapplicable, not because he used it, as it were, by *precarium*, but because he did not use it. So according to this, he is held to have used neither way, since he made even less use of the way which he did not follow because of the inconvenience of a stream or because a public road was blocked. The same should be said even if it was not a public road but a private way; for here the question is the same. 7. Anyone who had a tenant or guest or anyone else who made a way to the farm is held to have used that way on foot or with cattle, or that road, and for this reason will be entitled to the interdict; and so Pedius wrote, adding that even if he did not know whose farm he was crossing, he would still retain the servitude. 8. But if someone, thinking the farm to belong to him, made a way in his own name as my friend, he is certainly understood to have acquired the interdict for himself and not for me. 9. If someone did not use the way on foot or with cattle this year because of flooding, but used it in the previous year, he may avail himself of the interdict, antedated, through *restitutio in integrum*, by virtue of the clause "if I find there to be just cause." And even if he obtained this use by force, Marcellus holds that he should be granted *restitutio in integrum*. Besides, in other cases, an antedated interdict is available from which it is usual to get *restitutio in integrum*. 10. Furthermore, it should be known that if delay is granted to my adversary, so that my case under the interdict is going to be weakened, it is only fair that an interdict should be issued that is antedated. 11. If I concede to you by *precarium* a farm for which a road was due, and you then asked the owner of a farm by *precarium* for the use of that road to your farm, will a defense tell against you if you should wish to invoke the edict against the person from whom you asked for the road by *precarium*? The better opinion is that it would. This can be gathered from what Julian writes in a case of this kind. For he considers the question of what happens if I grant you a farm by *precarium* to which a road was due, and you ask by *precarium* to use that road; and he says that an interdict will nevertheless lie validly in my favor, because just as a *precarium* over my property does not bind me, so I am not understood to possess by *precarium* through you either. For whenever my tenant, or the person to whom I have given my land by *precarium*, uses the road, I am understood to go along it myself on account of which I say that I have been using the road rightfully. From the same reasoning, he says, it follows that if I ask for a road by *precarium* and give you a farm by *precarium*, even if you go along it on the understanding that it is due to my farm, the interdict would not lie and I would be held to be using the way by *precarium*, and deservedly so; for not your opinion but mine should be considered. However, you will in my view be able to avail yourself of the interdict, even though Julian wrote nothing about this. 12. If anyone has within a year, as written above, used a way not by force or stealth or *precarium*, but has not used it subsequently except by stealth or *precarium*, will this tell against him? The better opinion is that it will not tell against him, as far as concerns the interdict.

2 PAUL, *Edict, book 66:* For nothing that has been rightly transacted is impaired or changed by a subsequent offense.

3 ULPIAN, *Edict, book 70:* Hence, Labeo writes: If you have rightfully been having the use of a road from me, and I sell the farm through which the road you used went, and then the buyer prohibits you, then even if you are held to have the use of the road by stealth from him, (for whoever uses a road when prohibited uses it by stealth) the interdict is still available to you within a year, because in this year you will have used it not by force or stealth or *precarium.* 1. Again, it should be known that not only does one who uses a road when prohibited use it by stealth but also one who uses it when the person through whom he retained this right has been prohibited. But plainly, if I did not know of the prohibition and persist in using it, this cannot be said to hurt me. 2. If someone has taken from my agent the use of a road by force, stealth, or *precarium,* he is rightly prohibited by me from using the road, and the interdict avails him nothing, because he is held to take possession from me by force or stealth or *precarium* if he wrongfully takes possession from my agent. Pedius writes that if someone takes by force or stealth or *precarium* the use of a place to which I have succeeded by inheritance or purchase or some other right, it is not right that I should be hurt by what did not hurt the person to whose place I have succeeded. 3. In this interdict, consideration is given to the extent of the interest of the person concerned in not being prevented from using a road or way. 4. We are held to make use of servitudes also through slaves, tenants, friends, or even guests, and almost all who retain servitudes for us. A servitude is retained even through a usufructuary; but Julian says that this interdict is not available to an owner through a usufructuary. 5. Julian also writes: If I have the usufruct of your farm, but it is your property and each of us goes across the neighbor's farm, the interdict on right of way lies effectively in our favor. And whether the usufructuary is prevented by an outsider, or by the owner, or even the owner by a usufructuary, it still lies; for whoever it is who prevents passage has the interdict against him. 6. This interdict also lies in favor of anyone who has obtained vacant possession of a farm by way of gift. 7. If anyone buys a farm by my mandate, it is absolutely right that this interdict should be granted me "as such a one used it," that is to say, the person who bought the farm by my mandate. 8. But also if someone buys a usufruct or right of use, or if it is bequeathed and delivered to him, he will be able to avail himself of this interdict. 9. In addition anyone to whom a farm has been delivered by way of dowry will be able to have recourse to this interdict. 10. And in general, in all cases which have the form of a sale or any other contract, it is to be said that this interdict will be available. 11. The praetor says: "Where you have used a way on foot or with cattle this year not by force or stealth or *precarium* from such a one, I forbid the use of force to prevent you from repairing that way on foot or with cattle, as is your right. Whoever shall wish to make use of this interdict is to give a *cautio* to his adversary for any damage done by his fault." 12. Convenience has dictated the provision of this interdict also. For it followed logically that protection should be given to anyone using the way to enable him to repair it; for how else could he conveniently use a way on foot or with cattle than if he repaired it? One cannot very conveniently go or drive along a road that has been impaired. 13. This, however, differs from the above in that by that interdict all may avail themselves of that interdict who used the way this year; this interdict may only be used by someone who used the way this year and can show that he has the right to repair it. The right is held to belong to one to whom a servitude is due. So anyone who avails himself of this interdict must show two things: both that he used it this year and that he is entitled to the servitude. If either of these is lacking, the interdict is inapplicable, which is only right. For anyone who wishes to go and drive along a way until such time as the question of

the servitude is settled need not show evidence of his right; for what is lost by the person who suffers him to do what he has done this year? But he who wishes to repair is doing something new and should not be allowed to carry out this work in property not his own unless he really has the servitude. 14. It may happen that someone who has the right of way on foot and with cattle does not have the right to repair it, because it was provided when the servitude was drawn up that he should not have the right of repair, or so provided that if he should wish to repair, his right of repair should only be to a certain limit. So the praetor has rightly referred to repair in the words "repairing as is your right." "As is your right" means as is permitted to you by an imposed servitude. 15. By repairing we understand reducing the way on foot or with cattle to its original state, that is to say, not widening or lengthening, lowering or raising it. Repairing is a long way from building, which is quite a different thing. 16. In Labeo there is a question whether, if anyone wishes to build a bridge in order to strengthen a road, he should be permitted to do so. He said he should, because strengthening of this kind is a part of repair. And I think this opinion of Labeo true, provided that traffic would be impossible without it.

4 VENULEIUS, *Interdicts, book 1:* The old jurists used to add that no force should be used against anyone bringing what was useful for repair. This is superfluous, because not allowing to be brought what is indispensable for repairing the way is held to be using force to prevent its repair. 1. But if someone entitled to bring what is necessary for repair by a short route should wish to use a longer way which would cause damage to a farm, force will be used against him with impunity, because he is actually hindering himself from repairing the way.

5 ULPIAN, *Edict, book 20:* Therefore, it appears that anyone who does not allow the piling up of materials is using force to prevent repair. 1. Plainly, if anyone could have brought up materials in one part of a field without inconvenience to the owner and deliberately brought them in another, it is held that force can rightly be used against him. 2. This interdict can undoubtedly be granted to a person's successors and not just to himself. It can also be granted in favor of a buyer and against a buyer. 3. If anyone does not have a legally imposed servitude, but has the prerogative of long possession on the grounds of long use of a servitude, he may avail himself of this interdict. 4. Anyone who is going to avail himself of this interdict must give a *cautio* to his adversary for any fault in the work.

6 PAUL, *Edict, book 66:* Just as having made wrongful use in the same year will not harm anyone who is making use that is not wrongful, so their having made wrongful use will not harm a buyer or heir, if the vendor or testator made rightful use.

7 CELSUS, *Digest, book 25:* If someone has been passing through your farm not by force or stealth or *precarium*, nor as though he had any right to do so, but with the intention of not doing so if prohibited, the interdict on right of way on foot or with cattle is no use to him. For in order that this interdict should lie, he should have possessed the right of way.

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DAILY AND SUMMER WATER

1 ULPIAN, *Edict, book 70:* The praetor says: "Insofar as you have this year drawn off water in question not by force or stealth or *precarium* from such a one, I forbid force to be used to prevent you from drawing it off in this manner." 1. This interdict is for prohibition and for restitution in the meantime, and applies to daily water. 2. Daily water is not that water which is drawn off every day, but that which someone could use every day if he wished, including such water as it is not expedient to draw off every day even though it could be drawn off. 3. There are two kinds of water: daily

and summer water. Daily water differs from summer water in use not law. Daily water is what is normally drawn off in both summer and winter, even if there are times when it is not drawn off. Water of which the servitude is divided by intervals of time is also called daily water. Summer water is water that is only expedient to use in summer, just as we speak of summer clothes, summer pastures, summer camps, which are sometimes used even in winter but mostly in summer. I think that the distinction between summer and daily water is proved from the intention of the user and the nature of the place. For if it is water that can be drawn off all the time, but I use it only in summer, it should be said that it is summer water; and again if it is water that cannot be drawn off other than in summer, it will be called summer water; and if the place is such that by nature does not allow of water other than in summer, it should be said that it is rightly called summer water. 4. The words written in the interdict "insofar as you have this year drawn off the water" mean not every day, but for only one day or night this year. So daily water is water which could be drawn off every day, in winter or summer, even though it is drawn off at a certain moment of time, and summer water is what can indeed be drawn off daily, or only in summer, but is only drawn off in summer and not in winter, not because it cannot also be drawn off in winter, but because this is not normally done. 5. The praetor in this edict speaks of only such water as is perennial. For no water can be drawn off other than what is perennial. 6. Although we have said that this interdict applies to perennial waters, it applies to such perennial waters as can be drawn off. There are others which though perennial cannot be drawn off, such as well waters and underground waters which could not flow above ground and be of use. But a servitude may be imposed for raising waters of this kind which cannot be drawn off. 7. These interdicts on water, like those on springs, are held to apply only to such water as is drawn from a source and from nowhere else. For a servitude of these waters can be established by civil law. 8. The source of water is where it originates. If it originates from a spring, it is the spring itself; if from a river or lake, it is the first cuttings or the beginnings of the canal through which the waters are normally extracted from the river or lake into the first watercourse. Plainly, if the water oozes out and flows into some first place and there begins to appear, we shall call the place where it first emerges the source. 9. And however the right to the water is established, it is to be said that this interdict applies. 10. But even if the water is not due to someone by right, if he thought he was drawing it off by right, he has made a mistake of fact and not of law, so that it is to be said that he may avail himself of the interdict; and that is the rule we follow. For it is enough if he thought he was drawing it off by right and did not do so by force or stealth or *precarium*. 11. It is asked whether only such water is included under the edict as belongs to the irrigation of fields or also what is for our use and convenience. The law we follow is that these too are included. On account of this, even if someone wishes to draw off water for town properties, this interdict may apply. 12. Besides, Labeo writes that even if water is not drawn off for a farm, then because it may be drawn off to any place, the interdict still applies. 13. Labeo also writes that even though the praetor in this interdict means cold water, interdicts are not to be refused for warm waters, as there is a necessary use of these waters too. For sometimes they are cooled and provide a use for the irrigation of fields. Furthermore, in certain places the water is warm and is

needed for irrigating the fields, as at Hierapolis; for it is a fact that the Hierapolitans in Asia irrigate their fields with warm water. And even in the case of water which is not necessary for irrigating fields, no one will doubt that these interdicts will apply. 14. This interdict will apply whether the water is inside or outside a city. 15. But it is to be understood that the praetor ordered the water to be drawn off in the same manner as it was drawn this year. So he cannot be held to have permitted a fuller or different manner. So if it is some other water than that which somebody who drew it off this year wishes to draw off, or if it is the same water but he wishes to draw it off through another region, then force be used against him with impunity. 16. Labeo also says this: All the parts of a farm into which the water of a place is drawn off count as the same. So if it should happen that a farm manager buys a neighboring field and should later wish to draw off water from a field into which he drew water this year for the sake of the farm he bought, they think he may rightly avail himself of this interdict (as he may of that for right of way on foot or with cattle), so that having once entered his own he may leave it as he pleases, unless that will harm the person from whom he drew the water. 17. Again, it is asked whether anyone who mixes other water with the water he drew off this year can be prevented with impunity. There is an opinion of Ofilius that he may rightly be prevented, but only at that point where he first admitted the other water into the watercourse; and Ofilius says that he can rightly be prevented from using the whole of this water. I agree with Ofilius that it cannot be divided, because force cannot be applied to a part of the water and not the whole. 18. Trebatius says that when a greater number of herd animals are watered than ought to be watered, the whole herd may be prevented with impunity, because the addition of herd animals to a herd that has the right to drink destroys the whole right. But Marcellus says that if anyone has the right of watering a herd and brings up more herd animals, he is not to be prevented from watering all of them, which is true, because herd animals can be separated. 19. Aristo thinks that the interdict is only available to someone who thinks he is making use of his right and not to someone who is making use when he knows he has no right. 20. Aristo also says that someone who drew off water this year not by force or stealth or *precarium*, and made wrongful use in the same year, will rightly avail himself of the interdict, which is referred to the time when his use was not wrongful; for it is true that this year he made use not by force or stealth or *precarium*. 21. If someone drew off water before this year and in the time following, that is, within this year, the water has flowed to him of its own accord without his drawing it off for himself, does this interdict apply? Severus Valerius says it lies in his favor, as though he were held to have drawn it off, even if on closer examination he does not appear to have done so. 22. Again, if someone who thinks he has the right of drawing off water every third day, draws it off on one day, would he be held to have drawn it off rightfully, without loss to the proprietor, so as to have recourse to this interdict? For the praetor says: "insofar as you have this year drawn off the water," that is, on alternate days. Well, it makes no difference whether the person who wishes to avail himself of this interdict has the water due to him on the fifth day or on alternate days or daily. For since it is enough for him to have drawn off water for only one day this year, it is irrelevant what kind of right to draw off water he had when he did so, provided that if someone had the use every fifth day and invokes the interdict as if he drew off the water on alternate days, he is held to get no benefit from it. 23. Furthermore, it should be known that if when you drew off the water your adversary prevented you and you then lose the right to draw off for the time being, this comes [into consideration] for restitution, so that you may be given through this interdict what you have lost; and this I think true. 24. If you have sold and delivered the farm to which you were drawing off water, the interdict lies effectively in your favor all the same. 25. This interdict is available against whoever prevents me from drawing off water, and it makes no difference whether he has the ownership of the farm or not. Therefore, anyone at all may be liable under the interdict; for a servitude too, once imposed, may be vindicated against anyone at all. 26. If there is contention about the use of water between *rivales*, that is, those who draw off water through the

same *rivus* (watercourse), with each contending that the use is his, a double interdict lies for either. 27. Labeo thinks that through this interdict someone may be prohibited from doing, digging, sowing, cutting down, and pruning in such a farm, where by so doing he may pollute, vitiate, spoil, or worsen the water which such a one drew off through your farm without wrongdoing. And he says that a similar interdict is due for summer water. 28. If someone withdraws from the permission to get water for himself, that withdrawal is valid. 29. The praetor further says: "Insofar as during the previous summer you drew off from such a one the water in question not by force or stealth or *precarium*, I forbid the use of force to prevent you drawing it off in this manner. I will issue a similar interdict to heirs, buyers, and *bonorum possessores*." 30. This interdict is provided for summer water. 31. Because we have said that summer water is in some way different from daily water, it should be known that there is a difference between the interdicts. For the interdict on daily water runs as follows: "insofar as you have this year drawn off water," and the interdict on summer water "insofar as last summer," which is only right; for because he does not use it in winter, he had to be referred not to the present, but to the last summer. 32. The summer begins, so the experts tell us, from the spring equinox and finishes with the autumn equinox. And so there is a division of summer and winter with six months each. 33. The last summer I have taken to derive from the juxtaposition of two summers. 34. On account of this, a summer interdict often comprises a year and six months, which happens if water is drawn off at the beginning of the spring equinox, and in the following summer, an interdict is issued on the day before the autumn equinox. Moreover, if an interdict is issued in winter, this business may even extend to two years. 35. If anyone was only accustomed to draw off water in winter and not in summer, an effective interdict lies in his favor. 36. Anyone who drew off water this summer but not in the previous summer has an effective interdict. 37. The praetor says: "I will issue an interdict to heirs and buyers and *bonorum possessores*." It should be known that these words are to be referred not only to summer water but also to daily water. For just as interdicts for right of way on foot or with cattle are issued also to successors and buyers, so the praetor thought these too should be so granted. 38. The praetor says: "Where such a one, who had a right to it, was permitted to draw off water from that water tank (*castellum*), I forbid the use of force to prevent him from drawing it off as he is permitted to do. And when an interdict for the carrying out of works is issued, I will direct a *cautio* to be furnished for threatened damage." 39. This interdict was provided out of necessity. For the above interdicts apply to those who draw water off from a source, either because of an imposed servitude or because they believe one to have been imposed. It was held quite right to grant an interdict also to someone who draws it off from a water tank, that is, from a receptacle for the collection of public water. 40. If it is permitted to draw off from the water tank, the interdict will be granted. 41. But in that case, it is permitted to draw the water from the water tank either out of the watercourse or out of any other public place. 42. This is a concession of the emperor's. No one else is entitled to grant the right to draw off water. 43. And it is sometimes granted to landed estates, sometimes to persons. Grants to landed estates are not extinguished with the person; grants to persons are lost with the person and are not transferred to another owner of the lands or to an heir or successor of any kind. But a grant may plainly be obtained by the request of him to whom the ownership passes. For if he can show that the water is due to his lands, then although it flows under the name of the person from whom ownership has passed to him, he undoubtedly obtains the right of drawing off water. And this is no favor; but if someone should happen not to obtain it, it is an injury. 44. We should remember that with this interdict the entire question of assignation is concluded. For unlike the interdicts above, this interdict is not preparatory to a case, nor does it apply to temporary possession. But either he has the right assigned to him or he has not, and the whole matter is concluded with the interdict.

2 POMPONIUS, *Sabinus, book 32:* If I have the right of drawing off water during day or night hours, I cannot do so during any other hour than the ones to which I am entitled.

3 POMPONIUS, *Sabinus, book 34:* We make use of this right so that water may be drawn off not only for irrigation, but for herd animals or amenity. 1. Several people may draw water from a river, but on condition of not harming the neighbors, or even, if the river is narrow, those on the opposite bank. 2. If you draw water from a public river and the river recedes, you may not follow up to the river, because a servitude is not imposed on that place even if that place is the riverbed. But if it has by degrees silted up with alluvion from your farm, you may follow up to the river, because the whole place of the river is under the servitude for drawing off water. But if the river changes its bed and begins to flow round, you may not, because the middle ground is not under the servitude and the servitude is interrupted. 3. Water which originates in the watercourse tacitly falls to the profit of the person drawing off the water through it. 4. Drawing off of water which goes back beyond anyone's memory is held as if constituted by right. 5. Someone who has the right of daily water may insert a pipe into the watercourse or do anything else he pleases, provided that he does not cause any deterioration of a farm for its owner or of a water channel for others drawing off water through the same watercourse. 6. If water is drawn off, it is said to be lawful to bridge the watercourse with another one, provided the lower watercourse is not harmed.

4 JULIAN, *Digest, book 41:* I have ceded to Lucius Titius the right of drawing water from my spring. The question is: May I cede to Maevius also the right of drawing water along the same water channel? If you think it possible to cede water along the same water channel to two persons, how should they use it? He replied: Just as a right of way on foot or with cattle, or of a road, can be ceded to several people either together or separately, so the right of drawing off water can rightly be ceded. But if those to whom the water is ceded cannot agree how to use it, it will be only fair that an *utile judicium* should be delivered, as it has been held should be done for dividing a common usufruct among the several people to whom it belongs.

5 JULIAN, *Minicius, book 4:* As it is settled that water may be divided not only by times but also by measures, at the same time one person may draw off daily water and another summer water on the understanding that the water is divided between them in summer but that in winter the one with the right to daily water may draw it off by himself. 1. Between two people who used to draw water from the same watercourse separately at different times, it was agreed that they should use the water at times they had interchanged. I ask whether, since for a long time previously they had drawn off water in the time fixed for the servitudes, they have lost the right of use now that neither is using his own time. He said they had not lost it.

6 NERATIUS, *Parchments, book 3:* When inquiring about the interdict on summer water and again on daily water, we thought it should first be established what summer water is on which a special interdict is usually granted with reference to the time of the last summer, that is, whether summer water is such as one should be said to have a right to use only in the summer or whether it is so called from the mind and intention of the user, because he is planning to draw it off only in summer, or from the nature of the water itself, because it could only be drawn off in summer, or from the convenience to the places to which it is drawn off. Consequently, it was decided that the water is properly named because of two things; its nature and the convenience to the places to which it is drawn off; so that whether its nature is such that it cannot be drawn off other than in summer, even if it was also required in winter, or whether its nature allows it to be drawn off at every time of year, if the convenience of the region to which it is drawn off requires its use only in summer, it will rightly be called summer water.

7 PAUL, *Sentences, book 5:* If an action is brought over a right of way by road, on foot, or with cattle, or over the drawing off of water, a *cautio* must be provided, while someone is showing proof of his right to the effect that he will not impede going on foot or with cattle or drawing off water. But if he denies that his adversary has any right to

go on foot or with cattle or to draw off water, the latter is to give a *cautio* without prejudicing his claim to the servitude that he will not use it.

8 SCAEVOLA, *Definitions, sole book:* Anyone to whom a way through a farm for water is due may make a conduit in it along the line he wishes, provided that he does not change the line of the water channel.

21

WATERCOURSES

1 ULPIAN, *Edict, book 70:* The praetor says: "I forbid the use of force to prevent such a one from repairing or cleaning for the purpose of drawing off water, watercourses, culverts, or sluices, provided that he does not draw off water in any other way than he drew from you last summer not by force, stealth, or *precarium.*" 1. This interdict is of the greatest usefulness. For unless someone is allowed to repair, no other arrangement will prevent impairment of use. 2. The praetor says: "watercourses, culverts, and sluices." A watercourse (*rivus*) is a place sunk lengthways along which the water runs, so named from the Greek *rhein,* to flow. 3. A culvert (*specus*) is a place from which one looks down (*despicitur*). *Spectacula* (shows) have the same derivation. 4. Sluices are what are set against an *incile* (cutting) for taking and extracting water from a river, made either of wood or stone or some other material, and devised to contain and transmit water. 5. An *incile* is a place sunk at the side of a river, so called because it is cut (*incidatur*). The cutting is made into stone or earth so that through it water may first be brought from the river. But canals and wells are also included under this interdict. 6. The praetor then says: "Repair or clean." To repair is to restore to its original state what has been impaired. The verb repair comprises covering, underlaying, and making good, and also transporting and bringing up whatever is needed for the work. 7. The word "clean" many people think applies to a watercourse that is in good repair. But it obviously also applies to one in need of repair. As a rule, a watercourse in need of repair needs cleaning too. 8. He says: "for the purpose of drawing off water." This is rightly added, because one may only be permitted to repair and clean a watercourse for the purpose of drawing off water. 9. This interdict also applies to someone who does not have the right to draw off water, provided that in the previous summer or the same year he drew off water, the only requirement being that he did not do so by force, stealth, or *precarium.* 10. If someone wishes to turn an earthen watercourse into one of *opus Signinum,* that is, stone, it is held that he cannot rightly avail himself of this interdict; for he is not repairing if he is doing this; and so Ofilius holds. 11. Furthermore, if he wishes to conduct it through some other place, he can be prevented with impunity and even if he sinks or raises or enlarges it or covers it when open or vice versa. Indeed, I think others may be prevented with impunity, including anyone who covers a watercourse when open or vice versa, unless his adversary can show it is for greater convenience.

2 PAUL, *Edict, book 66:* Labeo says it is not possible to take an open watercourse through the earth, because this detracts from the convenience of the owner of the ground in watering cattle or raising water. Pomponius did not agree with this, because the owner of the ground was benefiting more by chance than by right, unless this had been provided for from the beginning when the servitude was imposed.

3 ULPIAN, *Edict, book 70:* Servius writes that it is a case of drawing off water in another way if what was previously drawn off through a culvert is now drawn off in an open watercourse. For it is [only] if someone's work improves the conservation and

containment of the water that he cannot be prevented with impunity. I think this also applies in the opposite case of turning it into a culvert, unless the adversary can show it is for greater convenience. 1. Servius and Labeo write that if he wishes to make a watercourse through the earth, because it did not hold the water, cemented, he should be heard. But also if he wishes to make a watercourse that was of masonry into an earthen one wholly or partly, he should equally not be prohibited. My view is that urgent and necessary repair must be allowed. 2. If someone wishes to place a new channel or pipe into the watercourse when it never had one, Labeo says this interdict will effectively avail him. And I think that here too the convenience of the person who draws off the water should be considered, as long as no inconvenience is caused to the owner of the field. 3. This interdict applies to all watercourses, whether on public or on private land. 4. If the water is conducted into one lake and from there drawn off by several ducts, this interdict will effectively lie for repair of the lake itself. 5. This interdict applies to all watercourses, whether on public or on private land. 6. Even if it is a watercourse of warm water, this interdict will lie for its repair. 7. Aristo thinks that an *actio utilis* will lie for the repair of a steam conduit for steam baths. And it must be said that an effective interdict will lie for this purpose. 8. This interdict will be granted for and against the same persons who are the subject of the interdicts on water enumerated above. 9. If someone serves notice on a person who is repairing a watercourse that it is a new work, it has been neatly explained that this notice should be disregarded. For since the praetor forbids the use of force against him, it is absurd that a notice of new work should stop him. But plainly, it must be said that he can be stopped by an action on the thing. A *vindicatio* of "his having no right" may undoubtedly be made against him. 10. There cannot be the least doubt that he must give a *cautio* for threatened damage. 11. If anyone prevents him from carrying or transporting what are necessary for the repair, Ofilius thinks this interdict lies in his favor, which is true.

4 VENULEIUS, *Interdicts, book 1:* Interdicts will be granted for the repair of watercourses without inquiry about whether the person taking the action is entitled to draw off the water. For the repair of ways is not as necessary as that of watercourses, since if watercourses were not repaired, all use of the water would be lost and people would die of thirst. But when a way is not required, all that could happen is difficulty in walking and driving, which would be less serious in summer time.

22

SPRINGS

1 ULPIAN, *Edict, book 70:* The praetor says: "Insofar as you have used water from the spring in question this year not by force, stealth, or *precarium*, I forbid the use of force to prevent your using it in this manner. I will give the same interdict on lakes, wells, and fishponds." 1. This interdict is provided for someone who is prevented from using the water of a spring. For servitudes are normally not only for drawing water but also for raising it; and just as servitudes for drawing and raising water are distinct, so the interdicts are granted separately. 2. This interdict applies if someone is prevented from using water, that is to say, from raising it or watering herd animals from it. 3. And the same things are to be said with respect to persons as have been said of the interdicts above. 4. This interdict does not apply to cisterns. For a cistern does not have a perennial state or fresh water. From this it appears that a requirement in every case is that the water should be fresh, whereas cisterns are filled by rainwater. Hence, it is settled that the interdict no longer applies, if a lake, fish pond, or well has no fresh water. 5. Plainly if someone is prevented from going to raise water, the interdict will be just as adequate. 6. The praetor goes on to say: "I forbid

the use of force to prevent you from cleaning and repairing the spring in question, so that you may extract water from it and use it, provided that you use it in no other way than you did this year not by force, stealth, or *precarium.*" 7. This interdict has the same usefulness as that for the repair of watercourses; for unless permission is given to clean and repair a spring, it will be unusable. 8. Its cleaning and repairing is for the extraction of water, so that the person concerned may use its water, provided that he does not use it other than in the way he used it this year. 9. To extract water is to contain it so that it does not flow or ooze away, provided that it is not permitted to seek out and open new veins; for that is an innovation beyond the previous year's use. 10. The interdict also lies for the repair and cleaning of a lake, well, or fish pond. 11. And it will be granted to all persons who are eligible for the interdict on summer water.

23

DRAINS

1 ULPIAN, *Edict, book 71:* The praetor says: "I forbid the use of force to prevent you from cleaning and repairing the drain in question, which reaches from his house to yours. I will give orders for a *cautio* to be furnished for threatened damage by any faulty carrying out of the work." 1. Under this title, the praetor has placed two interdicts: one for prohibition, the other for restitution. The first is for prohibition. 2. The praetor has taken care by means of these interdicts for the cleaning and the repair of drains. Both pertain to the health of *civitates* and to safety. For drains choked with filth threaten pestilence of the atmosphere and ruin, if they are not repaired. 3. This interdict is provided for private drains, as public drains deserve public care. 4. A drain is a hollow place through which certain waste matter should flow. 5. In this interdict, what is set out first is prohibitory and forbids the neighbor from using force to prevent the cleaning and repair of the drain. 6. Under the term "drain" are included tubes and pipes. 7. Because the repair and cleaning of drains is held to affect public welfare, it was therefore decided not to add in the interdict "which such a one has used not by force or stealth or *precarium,*" so that, even if someone did have such a use, he should still not be forbidden to repair and clean a drain if he wished. 8. Then the praetor says: "which reaches from his house to yours." By "house" you should here understand any building; so it means from his building to your building. In addition, Labeo thought this interdict would apply if there was an open space on either side of the house, and if it should happen that the drain leads from an urban building into a neighboring field. 9. Labeo also writes that protection against force should be given to anyone wishing to conduct a private drain into the public drain. And Pomponius also writes that if anyone wishes to make a drain so that it has an outlet into the public drain, he is not to be hindered. 10. When the praetor says, "reaches," this means what reaches from his house to yours, that is, "is directed, extends, stretches." 11. And this interdict applies both to the next door neighbor and to more distant ones, through whose houses the drain runs. 12. Hence, Fabius Mela writes that this interdict entitles him to enter the house of his neighbor and take up the paving so as to clean the drain. But Pomponius says that it is to be feared in this case that the stipulation for threatened damage may come into effect. But this will not happen if he is prepared to restore what he took up because it was necessary for repairing the drain. 13. If anyone serves notice on me when I am cleaning or repairing a drain that it is a new work, it will quite rightly be said that I can disregard the notice

and go on with the repair I had begun. 14. But he will also have to promise a *cautio* for threatened damage in case of any damage from faulty work. For just as repair and cleaning of drains is to be permitted, so it must be said that it should be in a manner that does no damage to other people's houses. 15. The praetor then says: "If you have anything done or inserted in a public drain by which its use is or shall be made worse, you are to make it good. And I will issue an interdict that nothing should be so done or inserted." 16. This interdict applies to public drains, so that you should have nothing that is done or inserted in a public drain by which it is or shall be made worse.

2 VENULEIUS, *Interdicts, book 1:* Although the repair of a drain, but not the building of a new drain, is included in this interdict, nevertheless, Labeo said that there should be a similar interdict against the use of force to prevent the building of a drain of the same usefulness; for the praetor had issued an interdict of this kind, forbidding the use of force to prevent the building of a drain in public land; and that this had met with the approval of Ofilius and Trebatius. Labeo himself said that it should be said that the cleaning and repair of a drain already built should be permitted by interdict, but that the building of a new one was for the curator of public ways to concede.

24

AGAINST FORCE OR STEALTH

1 ULPIAN, *Edict, book 71:* The praetor says: "You are to make good what has been done by force or stealth in the property in question, as there is the power of resorting to proceedings." 1. This interdict is for restitution, and by its means the cunning of those who are gaining certain objects by force or stealth is opposed; for they are directed to restore them. 2. And it makes little difference whether he had a right to do what he did or not; for whether he had or not, he is still liable under the interdict, because he did it by force or stealth; for he should have protected his right, but not contrived injury. 3. The question then arises whether he may bar the person availing himself of this interdict with the defense "what I did not recover by my right." The better opinion is that he cannot. For nobody may defend himself with a just defense for what he has done by force or stealth. 4. This interdict applies only to those works which are carried out by force or stealth on the land. 5. Let us see what is done by force or stealth. Quintus Mucius wrote that anything is done by force if it is done against prohibition, and I hold Quintus Mucius's definition to be adequate. 6. And if anyone, when prohibited by the throwing of the smallest pebble, persists in doing something, Pedius and Pomponius write that he is doing it by force, and this is the rule we follow. 7. And if he does it against a declaration before witnesses and the serving of due notice, Cascellius and Trebatius think the same; which is true. 8. And Aristo says that force is also used by one who, knowing he will be prohibited, contrives to make prohibition impossible. 9. Again, Labeo writes: "If I prohibit someone from doing something and he desists for the present, and later begins again, he is held to have done it by force, unless he began to do it with my permission or because there happened to be some good cause." 10. But if someone was prevented by weakness or even by the fear of offending you or someone who thinks highly of you, and for this reason did not come to prohibit, his adversary will not be held to have used force; and so Labeo writes. 11. Labeo also writes that even if someone frightened you off (perhaps with arms) without any fraud on my part, when you were wishing to come to prohibit, and because of this you did not come, I am not held to have used force,

2 VENULEIUS, *Interdicts, book 2:* so that it should not be in the power of someone else to make my case worse when I am guilty of no offense.

3 ULPIAN, *Edict, book 71:* Prohibition does not necessarily have to be by the adversary himself. If anyone expresses it through a slave or a procurator, he is rightly held to have prohibited, and the same applies even if a paid servant has prohibited. And it is of no moment that the right to an action is not usually acquired through a free person. For since this prohibition shows that you are using force, why should that be surprising, when, even if you had acted by stealth in my absence, I would have a right to an action? 1. It should be known that force need not be used at every moment; it need only have been used once at the beginning for it to persist. 2. But if the person availing himself of the interdict gave his permission, a defense will be necessary against him. 3. And not only if I give my permission; but even if it is given by my procurator, or the tutor who administers tutelage of a *pupillus*, or the curator of a lunatic or adolescent, it must be said that there will be scope for the defense. 4. Plainly, if the governor or curator of the public administration permits the doing of something in a public place, Nerva writes that the defense is inapplicable, because, although the care of public places is his responsibility, he does not have the right of making concessions. This is true, provided that the municipal law does not give additional privileges to the curator of the public administration. But even if permission is given by the emperor or by someone to whom the emperor has granted the right of concessions, the same will be affirmed. 5. If anyone is ready to defend himself in court against those who think there should be recourse to the interdict, so that it need not be invoked, should he be held to have desisted from using force? The better opinion is that he should, provided that he offers security and is prepared to defend himself if anyone brings an action. And so Sabinus writes. 6. And if anyone is prepared to give a *cautio* for threatened damage, when he has been prohibited only because he was offering no defense or *repromissio* for threatened damage, it will follow logically to say that he is desisting from using force. 7. Stealth is held, as Cassius writes, to be concealment from the adversary and failure to notify him because the perpetrator fears or ought to fear his opposition. 8. Aristo also thinks that a person is acting by stealth if he avoids, with the intention of concealment, one who, he understands, would prohibit him, and thinks or ought to think that he will be prohibited.

4 VENULEIUS, *Interdicts, book 2:* Servius thinks that even one who ought to think that he will meet with opposition is acting by stealth, because no one's opinion ought to bring him advantage when it is inconsiderate misjudgment, for fear that the stupid should have a better case than the sensible.

5 ULPIAN, *Edict, book 70:* A person has also acted by stealth if he has done otherwise than he gave notice that he would do, or if he does something by deceiving the person who has an interest in it not being done, or if he deliberately notifies his adversary when he knows the latter is incapable of prohibiting him, or if he notifies him so late that he cannot come to prohibit before it is done. And Aristo says that Labeo affirms this. 1. If anyone gives notice that he will carry out a work, he will not always be held not to have done it by stealth, if he does it after the notification. For (so Labeo writes) the day and hour will have to be included in the notification, and where and what work it will be; and he is not to speak and give notice vaguely or obscurely, nor so

to restrict the adversary that he cannot come within a day to prohibit. 2. And if there should be no one to notify, and this is not because of fraud, then notification should be given to friends or the procurator or the household. 3. Indeed, Servius rightly says that it is enough for someone to notify a woman or man that he will carry out a work, although it is enough not to have the intention of concealment. 4. He also says that if anyone wishes to do anything on public land belonging to a municipality, it will be enough for him to notify the curator of the public administration. 5. If someone, thinking my place to be yours, does something with a view to concealment from you, not me, the interdict will lie in my favor. 6. He also says that if it is done with a view to concealment from my slave or procurator I will have the interdict. 7. If anyone fails to give notice that he will carry out a work or does it when notice has been served on him not to do it, I think it is to be affirmed more effectively that he did it by force. 8. The words "what has been done by force or stealth" mean, so Mucius says, as much as "what has been done by you, or one of yours, or by your order." 9. Labeo says several people are included in these words. For first of all, he thinks, the heirs of those enumerated by Mucius are included. 10. Labeo also says that the interdict may be invoked against a procurator, tutor, curator, or syndic of a municipality in the name of another. 11. If my slave did something, an action against me lies not on account of this, but if he acted in my name or in his. For if I pay your slave, there will be an action under this interdict on account of whatever he does in my name not against you, but against me, by whose order or in whose name that work was done by your slave. 12. Similarly, when anything is done by someone's order, an action will lie not against him, but against the person in whose name he gave the order. For if a procurator, tutor, curator, or *duovir* of a municipality ordered the doing of what was being carried out in the name of someone whose business he was transacting, an action on this will have to be brought against the person in whose name it will have been done, and not against the person who gave the order. And if I mandate you to order a work to be done and in this matter you obey me, the action, he says, will be against me and not against you. 13. And since the interdict is worded "what has been done by force or stealth" and not "what you have done by force or stealth," Labeo thinks it may be extended further than to the persons whom we have enumerated above. 14. And this is the rule we follow, so that I shall be liable under the interdict against force or stealth, whether I did something or ordered it to be done.

6 PAUL, *Edict, book 67:* If I mandate you to do a new work and you mandate someone else, it cannot be held to be done by my command. So you and he will be liable. Let us see whether I shall be liable too. The better opinion is that I shall be liable for having initiated the matter; but when one of these gives satisfaction, the others are released.

7 ULPIAN, *Edict, book 71:* If someone else has done something against my will, I shall be liable to the extent of submitting [to its removal]. 1. Neratius also writes that someone whose slave has done something by force or fraud must make good the work at his own expense under the interdict, or submit to its being made good and surrender the slave noxally. Plainly, if the interdict were issued when his slave was dead or alienated, he says he need only submit on the understanding that the buyer may be sued under the interdict to make good the work at his expense or make noxal surrender. If the owner of the work makes it good at his expense or is condemned for not making it good, the buyer is released. And the same applies if, on the other hand, the owner of the slave makes good the work or is condemned to pay damages. But if he only made noxal surrender, the interdict can effectively be invoked against the owner of the work. 2. Julian says that anyone who has carried out work before the withdrawal of the notice of prohibition is liable under two interdicts: one which lies as a result of the notice against new work and the other against force or stealth. After the withdrawal he will not be understood to be doing anything by force or stealth, even though he should be prohibited. For if he gives security he must be allowed to build, since he is established as possessor by this very fact. And he cannot be considered to have acted by stealth before or after the withdrawal, since the person serving the

notice against new work could not be held to have been the victim of concealment, or to have been forestalled, before raising his objection. 3. In Julian, the question is well put, whether under this interdict the defense "what you did not by force or stealth" would tell. Take the case of my using against you the interdict against force or stealth; could you oppose me with the defense "what you did not by force or stealth?" Julian says it is quite right to grant this defense. For if, he says, you have built by force or stealth, and I demolish your building by force or stealth, and you use the interdict against me, this defense will be to my advantage. But this procedure should only be followed for good and sufficient cause. Normally, it is the duty of the judge to go into all these things. 4. There is another defense of which Gallus doubts whether it should be advanced. Take the case of my having pulled down my neighbor's house to ward off a fire, as a result of which an action against force or stealth, or for unlawful damage, is being brought. Would it be proper to bring the defense "what was not done for the purpose of defense against fire?" Servius says that if the magistrates did this, the defense should be granted, but that the same concession should not be made to a private person; but if it was done by force or stealth and fire did not reach that far, damages for the simple value should be awarded; if it did, the doer should be released. He says the same applies if there should be an action for unlawful damage, because it is held that no injury or damage can be equal to that of a house about to perish. However, if this was done in no fire, but the fire started subsequently, the same should not be said; but Labeo says that it should not be from a later event, but from what happened at the time, that assessment is made on whether or not damage was inflicted. 5. We have noted above that although the words of the interdict have a wide application, they only apply to those works which are done on the land. So if any work is done on the land, the interdict applies. Anything which is done to trees we take as being done on the land, but not what is done to the fruits of trees. So anyone who touches fruits is not liable to the interdict against force or stealth; for he is not carrying out any work on the land. But anyone who cuts down trees will certainly be liable, as will anyone who cuts down reeds or osiers; for he is laying hands on the earth and in a certain manner on the land itself to its hurt. The same applies to cutting down vines. But someone who takes away fruit should be sued for theft. 6. If anyone scatters a pile of dung over a field that is [already] rich, an action can be taken against him under the interdict against force and stealth; and this is true, because wrongful damage has been done to the land. 7. Plainly, if it is done for cultivating the field, the interdict against force or stealth is inapplicable, if the condition of the field is made better, even if he did it by force or stealth when prohibited. 8. Moreover, if you dig a ditch in a public wood and my ox falls into it, I can take an action under this interdict, because it was done on public land. 9. If anyone pulls down a building, even if not down to the ground, there is no longer any room for doubt that he is liable under the interdict. 10. So even if someone takes off the tiles from a building, the better opinion is that he is liable under the interdict.

8 VENULEIUS, *Interdicts, book 2:* For a building originates from the land; and the tiles are not possessed for their own sake, but as part of the whole building. And it makes no difference whether they are fastened or merely laid on.

9 ULPIAN, *Edict, book 71:* For even if someone removes branches from a tree, we admit the interdict to this extent. The same applies if someone takes tiles off a roof; but if from a separate stack and not a roof, the interdict does not apply. 1. However, if a bolt or grille or windowpane is removed, an action against force or stealth cannot be brought. 2. But if anyone tears away something fixed to a wall, say a statue or anything else, he will be liable under the interdict against force or stealth. 3. If anyone by stealth plows or digs a ditch in a field, he will be liable under this interdict.

But if he burns or scatters a stack, so as not to convert it to agricultural use, the interdict will be inapplicable

10 VENULEIUS, *Interdicts, book 2:* because a stack is not attached to the land, but is laid on the earth, whereas buildings are attached to the land.

11 ULPIAN, *Edict, book 71:* Someone who pours something into a well so as to pollute the water with it is, Labeo says, liable under the interdict against force or stealth; for fresh water is part of the land, just as if someone had done a work connected with water. 1. It has been asked whether, if someone takes a statue away from a public place by force or stealth, he would be liable under this interdict. And there is an opinion of Cassius that someone who has a statue set up in a public place can bring an action against force or stealth, because it was in his interest that it should not be removed, while the municipality can go further and bring an action for theft, because it is their property, as it were, exhibited publicly. For if it has fallen down, it is they who have to drag it away. And this opinion is true. 2. If someone removes a statue from a funerary monument, is the person who has the right to the tomb allowed to take an action? It is held that the interdict applies here too. And indeed it is to be said that anything added for the purpose of adorning a tomb is held to belong to the tomb. 3. It is the same if someone pulls out or breaks down a door. If someone enters my vineyard and removes my vine stakes, he will be liable under this interdict. 4. Let us see to what time the praetor's words "what has been done by force or stealth" apply, the past or the present. This question is expounded in Julian. He says this interdict must be taken to apply to present time. But if damage has been caused by a work, and the owner, or the person whose farm is harmed, has put up with it at his own expense, the interdict will be found more effective both to make good the damage and restore the expense. 5. The interdict comprises whatever has been done by force or stealth. But sometimes it happens that what is done by force or stealth in the same work is partly one thing and partly the other. Take the case of your having laid foundations when I was prohibiting you. Then, when I had sued you to prevent the rest of the work, you finished the rest of it while I was absent and unaware of it. So you laid the foundations by stealth and then built the rest against my prohibition. We follow this rule, that if something has been done by both force and stealth, this interdict applies. 6. If it is done by direction of a tutor or curator, then since it is held, as Cassius approves, that a *pupillus* or lunatic is not liable for the fraud of his tutor or curator, it will follow that it is against the tutor or curator himself that an *utilis actio* or even an effective interdict will lie. To be sure, the *pupillus* or lunatic will be liable to submit to the removal of the work and to noxal surrender. 7. Or will a slave be pardoned if he has obeyed the tutor or curator? For in the case of certain acts which are not atrocious offenses or crimes, slaves are pardoned if they have obeyed their masters or those who take the place of masters, which is to be admitted in this case. 8. If the farm should be sold after something was done by force or stealth, let us see if the seller can still avail himself of this interdict. There is an opinion maintaining that the interdict still lies in favor of the seller, and is not finished with the sale. He does not have to pay anything to the buyer under an action on sale because of a work that was carried out before the sale; for it is quite enough if because of it he gets a lower price. 9. Plainly, if the work is done after the sale, even if the seller himself has recourse to the interdict because delivery has not yet been effected, he will still be liable to the buyer under an action on sale; for all convenience and inconvenience must now belong to the buyer.

10. If the farm is under *in diem addictio*, in whose favor would the interdict lie? Julian says the interdict against force or stealth lies in favor of him in whose interest it was that the work should not be done. Since, he says, when a farm is under *in diem addictio*, all the convenience and inconvenience belong to the buyer before the delivery of the sale, therefore, if anything is done then by force or stealth, even if the condition is improved by it, he will himself have the interdict effectively in his favor. But he says he can be compelled to assign the rights of this action, like those for fruits collected in the meantime, under a judgment on sale. 11.[1] Aristo writes that notification need not be made to the possessor in every case. For if, he says, someone sells me a farm and has not yet delivered it, and my neighbor, when he wanted to do a work and knew that I had bought the farm and was staying in it, notified me, he would be safe from any suspicion of doing the work by stealth; which is indeed true. 12. My own view is that if, after the farm has been put under *in diem addictio*, it is delivered by *precarium*, the buyer is entitled to the interdict against force or stealth. But if the delivery has not yet been effected or if it has been and the request for *precarium* has been made at the same time also, I think that the seller is undoubtedly entitled to the interdict. For it should be available to him even if his own property is not endangered, and it makes little difference that it is the buyer's property that is in danger; for immediately after the conclusion of a contract of sale, the danger applies to the buyer, and yet before delivery no one has said that he is entitled to the interdict. But if he is in possession by *precarium*, let us see whether he cannot have recourse to the interdict, since in whatever way he is in possession, it is in his interest that he should. If he has it by lease, so much the better; for a tenant may undoubtedly avail himself of the interdict. Plainly, if after the introduction of better terms of lease some work is done by force or stealth, Julian would not doubt either that the seller would be entitled to the interdict; for what is at issue between Cassius and Julian is what happens in the meantime but not what happens afterward. 13. If a landed estate was sold on the understanding that its sale should be rescinded if it did not give satisfaction, we shall more readily admit that the buyer is entitled to the interdict, provided that he is in possession; and the same will be held if the rescinding of the sale is referred to the discretion of a third party. The same applies if it had been sold on the understanding that the sale should be rescinded in a certain eventuality; and if it should have been sold subject to a *lex commissoria*, the same should be said. 14. Julian also writes that this interdict is available not only to the owner of the lands, but also to those in whose interest it was that the work should not be done.

12 VENULEIUS, *Interdicts, book 2:* Although a tenant and usufructuary are admitted to this interdict for the sake of the fruits, it will lie in favor of the owner if he has any additional interest.

13 ULPIAN, *Edict, book 71:* Moreover, if trees in a farm whose usufruct belongs to Titius are cut down by a stranger or the proprietor, Titius will be able to avail himself of both the *lex Aquilia* and the interdict against force or stealth against either of them. 1. Labeo writes that if a work is done against your son's prohibition, you are entitled to the interdict, and if against yours, your son will be no less entitled. 2. Labeo also writes that in a property belonging to the *peculium* of his son-in-power nobody can be held to have done anything against him by stealth; for if he knows him to be his son-in-power, he is not held to have done it with a view to concealment from one who he was sure had no right of action against him. 3. If one of the partners in a common farm cuts down trees, his partner may avail himself of this interdict against him, since it lies in favor of anyone having an interest. 4. Hence, it is stated more fully in Servius that if you cede to me the right of cutting down trees from your farm, and then someone else cuts them by force or stealth, the interdict lies in my favor

1. Sections 10 and 11 have been transposed.

because I am the interested party. This will be more readily admitted if I bought them from you or have obtained the license to cut them down by some contract. 5. It has been asked whether, if something has been done by force or stealth during an interval when the lands belonged to nobody, afterward when the ownership has passed to someone there will be scope for the interdict. Take the case of an inheritance that was lying vacant; will Titius after accepting it be entitled to the interdict? There are frequent references in Vivianus to this interdict being available to an heir for what was done by force or stealth before the inheritance was accepted; and Labeo says it makes no difference that the perpetrator will not have known who the heirs were going to be; for that pretext could be given even after the inheritance was accepted. Nor is it an obstacle, Labeo says, that nobody was the owner at that time; for nobody is the owner of a tomb either, but if anything is done to it, I may avail myself of the interdict against force or stealth. Furthermore, an inheritance takes the place of ownership. And it will rightly be said that the heir and other successors will be entitled to the interdict, whether it is before or after their succession that anything was done by force or stealth. 6. If a tenant of mine does a work, then if he does it at my wish or with my ratification, it is just as if my procurator had done it in which case it is held that I am liable whether he did it at my wish or whether I ratified what my procurator did. 7. Julian says that if a tenant cuts down a tree about which there was controversy or does any other work, then if the owner ordered it to be done, both of them will be liable not only to submit to its removal but also to pay the cost of making good. If the owner gave no orders, the tenant indeed will be liable to submit to removal and pay the expense, but the owner will be compelled to do no more than submit.

14 JULIAN, *Digest, book 68:* If my slave did a work without my knowledge and I sell or manumit him, an action can only be brought against me that I should submit to the removal of the work, but against the buyer of the slave that he should surrender him noxally or pay the expense of making good. If he is manumitted, an action can be brought against the slave himself.

15 ULPIAN, *Edict, book 71:* This interdict always lies against the possessor of the work, and for this reason, if someone carries out a work in my farm without my knowledge or consent, the interdict will apply. 1. Someone to whom you had rented a farm for digging and leveling took out the stones and threw them on to the neighbor's lands. Labeo says you are not liable for force or stealth, unless he did so at your direction. I think the lessee is liable, but the landlord not otherwise than either to submit to making good or to assign certain rights of action; he should not be liable otherwise. 2. If earth is piled up at my direction in the tomb of someone else, Labeo says an action may be taken against me for force or stealth, and if it was done by the joint intention of several people, proceedings may be taken against one or more individually; for a work which is done by several people jointly entails full obligation on each of them individually. But if each one of them did this by his own intention, an action must be brought against all of them, that is to say, for restitution in full. So in this case the suing of one will not release the other, though payment by one will do so, whereas in the former case the suing of one does release the other. Besides this an action may be brought for tomb violation. 3. This interdict is granted against the heir and the other successors for what has come into their hands. 4. And after a year it does not lie. The year begins from when the work was finished, or stopped being done, even if it was not finished. Otherwise, if the year were counted from when the work began to be done, then the slower the work, the more often it would be necessary to bring an action. 5. But if the place where the work was done is not easy of access, for instance, if something has been done by force or stealth in a tomb or some other hidden place, or

if the work is underground or under water, or something has been done in a drain, then even after a year, upon cause being shown, the interdict will lie on account of what has been done. For if cause is shown, the defense [that a year has elapsed] is to be rejected, that is to say, if good and just cause for ignorance during that time is shown. 6. If someone was away on public service and then on his return wishes to avail himself of the interdict against force or stealth, the better opinion is that he should not be excluded by the year's passing, but should have a year upon his return. And if he was under twenty years old when he first went away on public service, and then reached his majority in his absence on public service, what will happen will be that the year will be counted from after his return, not from his fulfilling his twenty-fifth year; and so the deified Pius ruled in a rescript, followed by all other emperors. 7. Under this interdict the damages are assessed in a sum equal to the interest of the plaintiff in not having the work done. It should be the judge's duty to rule that restoration should be made so that the condition of the plaintiff is in every respect restored to what it would have been if the work, on account of which the action was brought, had not been carried out by force or stealth. 8. So sometimes account must be taken of ownership, for example, if, because of the work that has been done, servitudes are lost or usufruct lapses. This does not so much happen when someone constructs a building as when it is represented that he has pulled down a building and impaired the condition of the servitudes or the usufruct or the proprietorship itself. 9. But the interest must be estimated either by the plaintiff's oath in court or, if he cannot take an oath, by the determination of the judge. 10. Anyone who uses fraud to prevent himself from being able to make restoration is to be treated as if he were so able. 11. Negligence too is to be taken into account under this interdict and is to be assessed at the discretion of the judge. 12. But because this interdict comprises the interest, if anyone has obtained from a different action his interest in the work not having been done, it follows that one must say that he may obtain nothing under the interdict.

16 PAUL, *Edict, book 67:* This interdict is available even to nonpossessors, provided they have an interest. 1. If anyone by force or stealth cuts trees that bear no fruit, such as cypresses, the owner will still be able to have recourse to the interdict. But if some amenity is also provided by these trees, it can be said that the usufructuary has an interest too on account of their value for pleasure and promenades and that the interdict is available to him also. 2. In sum, whoever has done anything by force or stealth must, if he possesses it, submit to its removal and pay the expense. If he did it but does not possess it, he must pay the expense. If he possesses it but did not do it, he must only submit.

17 PAUL, *Edict, book 69:* The interdict against force or stealth is acquired for the owner by anyone, even a lodger.

18 CELSUS, *Digest, book 25:* If someone cuts a wood intended for felling before it is mature, he will be liable under the interdict against force or stealth. If he cuts a wood similarly intended for felling when it is mature, and the owner suffers no damage, he will pay nothing. 1. It has been not unreasonably replied that if you asked the magistrate to summon your adversary to court, so as to prevent him from serving a notice against a new work on you, you will be held to have done by stealth whatever you have done in the meantime.

19 ULPIAN, *Edict, book 57:* An interdict against force or stealth will lie when trees are cut down by a son-in-power who is a tenant, according to Sabinus.

20 PAUL, *Sabinus, book 13:* Force is used as much by someone who does something when prohibited as by one who has succeeded in avoiding prohibition by, for example, warning his adversary of danger or shutting his door against him. 1. Prohibition is

understood to be any act of prohibiting, such as expressing prohibition by word of mouth, raising a hand against someone or throwing the smallest pebble for the purpose of prohibition. 2. Someone who is prohibited does the work by force as long as the matter remains on the same footing. If he later comes to terms with his adversary, he is desisting from force. 3. Again, if the heir of the person who was prohibited, or someone who buys from him, does it without knowing the previous facts of the case, Pomponius observes that he is to be said not to have fallen under the interdict. 4. What is done in a ship or in anything else, however big, that is movable, will not be included in this interdict. 5. The interdict applies regardless of whether the work is done in a private or public place, or in a sacred or religious place.

21 POMPONIUS, *Sabinus, book 29:* If someone is directed to restore a work by a judge appointed under this interdict and someone else has demolished it by force or stealth, this same person will be directed to restore the work all the same. 1. If I direct my slave to do a work which, as far as I am concerned, would incur no suspicion of being clandestine, but my slave thinks that if the adversary had known he would have prohibited it, would I be liable? I think not, because it is my own person that should be considered. 2. In a new work, a measure must be taken of both the land and the sky above it. 3. If anyone has lost any right connected with his lands on account of a work that has been done, it must be restored under this interdict.

22 VENULEIUS, *Interdicts, book 2:* If you layer my vine from my farm into yours and it takes root in your farm, the interdict against force or stealth lies effectively in my favor within the year. But when the year is past, no right of action remains, and roots on your farm become yours because they are accessory to your vines. 1. If anyone plows by force or stealth, I think he is liable under this interdict just as if he had dug a ditch. For the interdict's application does not depend on the kind of work, but on the fact that the work done is attached to the land. 2. If you board up my door and I take down the boards before notifying you, and afterward we each bring an action against one another for force or stealth, then unless you desist so as to release me, you are to be condemned for not restoring the thing to the extent of my interest; or else I may certainly derive advantage from the defense "if you did it not by force or stealth or *precarium.*" 3. If you bring dung through my farm when I have forbidden you to do so, then although you have done no damage and have not changed the appearance of my farm, Trebatius says you are liable all the same for force or stealth. Labeo argues against this on the grounds that it would then follow that even someone who was only making his way across my farm, driving an ox, or hunting, without constructing any work, would be liable under the interdict. 4. If someone overhangs a tomb with a projection or water drip, even though it does not touch the tomb itself, an action can rightly be brought against him, because it has been done by force or stealth to the tomb. For the tomb is not only the place which receives the burial, but all the sky above it; and for this reason an action can also be brought for tomb violation. 5. If anyone gives notice that he is going to do new work and does the work immediately, he is not understood to have done it by stealth; but if after a time, he will be so understood.

25

WITHDRAWAL OF NOTICE

1 ULPIAN, *Edict, book 71:* The praetor says: "Where such a one has the right to prohibit something from being done against his will, the notice against it will hold good. Otherwise, I declare the notice withdrawn." 1. Under this title withdrawals are proposed. 2. And the praetor's words show that the withdrawal is only made where the notice does not hold good and that the praetor wished the notice to hold good where the person serving it has the right of prohibiting something from being done against his will. But whether or not security has meanwhile been given, the declaration of withdrawal only applies where a notice did not hold good. Plainly, if security is given, withdrawal is not necessary. 3. The right of serving notice against a new work belongs to the person who has ownership or a servitude. 4. Julian also holds that the usufructuary has the right of vindicating servitudes, so that it follows that he may serve notice against a new work on his neighbor, and withdrawal will be valid. But if he serves notice on the owner of the lands himself, the withdrawal will be void. For he cannot bring an action against the owner, as he can against a neighbor, to the effect that the owner has no right to build higher without his consent. But if his doing so makes the usufruct worse, he must claim for the usufruct. Julian says the same of others to whom some servitude is owed by a neighbor. 5. And Julian writes that it is only fair that a person who has accepted a farm by way of pledge should be granted the right to claim a servitude.

26

PRECARIUM

1 ULPIAN, *Institutes, book 1: Precarium* is what is conceded to one who asks for it for his use for as long as the person who made the concession suffers it. 1. This kind of liberality derives from the law of nations. 2. And it differs from a gift in that someone who makes a gift does it on terms of not getting it back, whereas someone who makes a concession by *precarium* gives it expecting to get it back when he chooses to dissolve the *precarium.* 3. It is similar to a loan for use. For anyone who makes such a loan does so not to make the thing lent the recipient's, but so as to let him use it.

2 ULPIAN, *Edict, book 71:* The praetor says: "In the case of the property in question, you are to restore to such a one what you have from him by *precarium,* or have fraudulently arranged no longer to have." 1. This interdict is for restitution. 2. And it is based on natural equity; for it lies in favor of anyone wishing to revoke the *precarium.* For it is in accordance with natural equity that you should make use of my liberality no longer than I wish and that I should be able to revoke it when I change my mind. So when something has been asked for by *precarium,* we may employ not only this interdict but also an *actio praescriptis verbis* which is based on good faith. 3. To have by *precarium* is held to be having secured possession either of a tangible object or of a right solely by reason of having asked for a favor and receiving it, so as to have possession or permitted use,

3 GAIUS, *Provincial Edict, book 25:* for instance, if you should have asked me by *precarium* for permission to cross my farm on foot or with cattle, or to have a water drip from your roof over the courtyard of my house, or a beam let into my wall.

4 ULPIAN, *Edict, book 71:* It is settled that a request for *precarium* applies to movable things also. 1. We should remember that anyone who has something by *precarium* also possesses it. 2. One who has asked by *precarium* will not in every case be liable under this interdict, but one who holds by *precarium* will. For it may happen that someone has something by *precarium* without having asked for it. Take the case of my slave having asked. He has acquired the *precarium* for me. Or someone else

subject to my rule might have asked. 3. Again, if I have asked for my own property by *precarium*, I have indeed asked by *precarium*, but I do not hold it by *precarium*, because it is agreed that there can be no *precarium* of one's own property. 4. Again, anyone who has requested something by *precarium* for a time is, when the time is over, held to possess it by *precarium* even if he did not ask to have it as long as that. For the owner, when he suffers the person who asked by *precarium*, to possess it, is understood to be once again conceding to *precarium*.

5 POMPONIUS, *Sabinus, book 29:* But if, when the *precarium* still remained, you asked for more time, the *precarium* is prolonged. For the condition of possession is not changed, and *precarium* is not established in this way, but is prolonged for a further period. But if you ask when the time has already lapsed, then it is more accurate to say that the condition of possession by *precarium* has now been dissolved, and is not renewed but established afresh.

6 ULPIAN, *Edict, book 71:* Certainly, if meanwhile the owner has succumbed to lunacy or died, Marcellus says the *precarium* cannot possibly be renewed; which is true. 1. If my procurator with my mandate or ratification has asked for something by *precarium*, I am said to have it on my own account. 2. One who has asked to stay in a farm by *precarium* does not possess it, but the possession remains with the person who conceded it. For the usufructuary, tenant, and lodger are, he says, on the land but do not possess it. 3. Julian says that someone who has ejected someone else by force and has then asked him for the property by *precarium* ceases to possess it by force and takes possession of it by *precarium*, and does not think that he is relinquishing possession when he begins to be a possessor with the consent of the person he ejected; for if he had bought it from him, he would now begin to be able to take ownership of it as buyer. 4. If someone has given his property to me by way of pledge and asks for it by *precarium*, does this interdict apply? The question depends on whether *precarium* can apply to one's own property. The better opinion seems to me that the *precarium* applies to the pledge, when possession is requested, and not to ownership. And this opinion is most serviceable, as every day creditors are asked by *precarium* by people for property they have given them in pledge, and *precarium* must apply.

7 VENULEIUS, *Interdicts, book 3:* And even if I have conceded to you by *precarium* property of which I am entitled to retain possession under the interdict for the possession of land, you will be liable under the interdict for *precarium*, although I may be going to lose my case for its ownership.

8 ULPIAN, *Edict, book 71:* What if Titius asks me for the use of property belonging to Sempronius, and I then ask Sempronius to concede it, and he makes the concession wishing it to be delivered to me? Titius has it from me by *precarium*, and I shall be able to take an action against him under the interdict on *precarium*; but Sempronius will not be able to take an action against him, because the words "you have from him by *precarium*" show that this interdict only applies to someone from whom a person has requested something by *precarium*, not to the one whose property it is. But is Sempronius entitled to the interdict against me, since he was asked by me? The better opinion is that he is not, since I successfully asked him not for myself but for another. However, he can have an action on mandate against me, because he gave it to you by my mandate; or if someone should say that he did not do this so much by my mandate as because he trusted me, it is to be said that an *actio in factum* should be granted to him against me. 1. What someone has asked for from Titius by *precarium* he is held to have by *precarium* from his heir also. So Sabinus and Celsus wrote, and this is the rule we follow. Consequently, he is held to have it by *precarium* from his other successors. Labeo confirms this and adds that even if he did not know who the heir was, he would still be held to have it by *precarium* from the heir. 2. But let us see how it would be if you asked me for something by *precarium* and I alienate it. Would the *precarium* continue when the thing has been alienated to someone else? The better opinion is that if he does not revoke the *precarium*, he can employ the interdict as

though you had it by *precarium* from him, not me; and if he has suffered you to have it by *precarium* from him for some time, he will rightly employ the interdict as though you had it by *precarium* from him. 3. The praetor wished anyone who had fraudulently arranged no longer to have also be liable for *precarium*. It is noted that someone who asked for something by *precarium* is held responsible not for negligence but only for fraud, whereas someone who took what he has borrowed is responsible not only for fraud but for negligence also. It is only fair that someone who has asked by *precarium* is held responsible for fraud only, since the whole matter derives from the liberality of the person who made the concession by *precarium*, and it is enough if there is responsibility for fraud only. 4. By this interdict there should be restoration to the original condition. If this is not done, there will be condemnation in a sum to the extent of the plaintiff's interest that the property should be restored from the time of the issuing of the interdict onward. So the fruits too will be delivered from the time of the issuing of the interdict. 5. If the person who asked by *precarium* has made no use of a servitude and it has consequently lapsed, let us see if he is liable under the interdict. I think not, unless he did this fraudulently. 6. And generally it must be said that fraud and negligence only are to be taken into account when restitution is made and nothing else. Plainly, after the interdict is issued, both fraud and negligence and every other cause of loss should be taken into account; for where someone has caused delay with respect to *precarium*, he must put every loss right. 7. Labeo writes that this interdict is available even after a year; and that is the rule we follow. For since *precarium* is sometimes conceded for a long period, it is absurd to say that the interdict cannot apply after a year. 8. Under this interdict, the heir of someone who has asked for something by *precarium* is liable just as much as he was himself, so that whether he has it or has fraudulently arranged that it should not come into his hands, he is liable. But he is liable for any gain by fraud of the deceased only to the extent that it has come into his hands.

9 GAIUS, *Provincial Edict, book 26:* Possession by *precarium* can be established between parties either present or absent, for instance, by letter or messenger.

10 POMPONIUS, *Plautius, book 5:* Although someone may have asked for a female slave by *precarium*, this is held to have been done on the understanding that any offspring that might be born from her would be in the same case.

11 CELSUS, *Digest, book 7:* If a debtor has asked by *precarium* for a thing that has been pledged, then when the money is paid off, the *precarium* is dissolved; for the intention is taken to have been that the *precarium* would only hold until then.

12 CELSUS, *Digest, book 25:* When something is given by *precarium*, if it is agreed that the recipient is to possess it by *precarium* until the first of July, cannot he be helped by a defense to ensure that he is not deprived of possession earlier? No, because there is no force in an agreement that entitles him to possess something without the consent of the owner. 1. A request by *precarium* passes to the heir of the person who made the concession, but not to the heir of the person who made the request by *precarium*, since the possession is conceded to him only and not to his heir also.

13 POMPONIUS, *Quintus Mucius, book 33:* If your slave has asked for something by *precarium* by your mandate or you have ratified his request in your name, you will be liable for having it by *precarium*. But if your slave or son has asked for it in his name without your knowledge, you are not held to have it by *precarium*, but there will be grounds for an action on the *peculium* or benefit taken.

14 PAUL, *Sabinus, book 13:* The interdict on *precaria* was rightly introduced because there was no action in civil law in that name. For the condition of *precarium* relates more to grants and cases of benefit than to cases of business contracted.

15 POMPONIUS, *Sabinus, book 29:* It is absolutely fair that someone should use what is ours for only as long as we wish to let him. 1. Guests and those who receive free lodging are not understood to have their lodging by *precarium*. 2. We may have by *precarium* what consists of a right, such as permission for the insertion of beams or projection of roofs. 3. When someone has obtained a *cautio* for the restitution of his property, the interdict on *precarium* is not available to him. 4. Someone who has

asked for permission to possess undoubtedly gets possession. It has been doubted whether the person who has been asked is also in possession. But it is settled that a man who has been given by *precarium* belongs to both: to the one who asked, because he possesses him bodily, and to the owner, because he has not relinquished his possession in mind. 5. In what place anyone possesses or takes possession by *precarium* is immaterial, as far as concerns the interdict.

16 POMPONIUS, *Sabinus, book 32:* If I adopt someone who has asked for something by *precarium,* I shall possess it by *precarium* too.

17 POMPONIUS, *Sabinus, book 23:* Anyone who possesses a farm by *precarium* may avail himself of the interdict for possession of land against all but the person he asked.

18 JULIAN, *Digest, book 13:* Anyone may give his property by *precarium,* even if he does not possess it himself, to the person who does possess it.

19 JULIAN, *Digest, book 49:* Two cannot each have the same thing in full by *precarium,* any more than can two by force or stealth. For two persons, whether rightly or wrongly in possession, cannot possess concurrently. 1. Someone who asks my slave for something is held to have it by *precarium* from me, if I ratify this, and therefore will be liable to me under the interdict on *precarium.* 2. When something has been asked by *precarium,* we may avail ourselves not only of the interdict but also of a *condictio* for an unspecified thing, that is, *praescriptis verbis.*

20 ULPIAN, *Replies, book 2:* Things that have been sold on the understanding that they are to remain by *precarium* in the hands of the buyer, until the whole price has been paid, may be got back by the seller if the buyer has deliberately failed to pay up.

21 VENULEIUS, *Actions, book 4:* When someone asks by *precarium* that he himself should be permitted to stay in a farm, it is superfluous to add "himself and his household"; for in every case permission to himself is held to mean permission to his household too.

22 VENULEIUS, *Interdicts, book 3:* If someone who is in possession as possessor has by *precarium* asked the owner to let him keep the property or someone who has bought someone else's property has asked the owner, it appears that they are possessors by *precarium.* And they are not to be thought to relinquish possession when the owner concedes possession by *precarium* to them. For if you have asked by *precarium* for what you already possess, you are held to stop possessing it on the previous terms and to take possession of it by *precarium.* On the other hand, if he has asked by *precarium* the possessor who could withdraw the property from him, he is liable for *precarium,* because something has come to him through this request for *precarium,* that is, possession of what belongs to someone else. 1. If a *pupillus* has asked by *precarium* without the authority of his tutor, Labeo says that he has precarious possession and is liable under this interdict. For there is no need for the tutor's authority for the *pupillus* to be in natural possession, and it will rightly be said, "what you have by *precarium,*" because what he possesses he possesses on the terms under which he asked for it. There is nothing new to be settled by the praetor, because either he has the property and will be bound by the decision of the judge, or he has not and will not be bound.

27

FELLING TREES

1 ULPIAN, *Edict, book 71:* The praetor says: "I forbid the use of force to prevent such a one from removing and having for himself the tree which overhangs his house from your house, if it is your fault that you are not removing it." 1. This interdict is for prohibition. 2. If a tree overhangs someone else's house, should the praetor order its total removal, or only the removal of the part which projects over the house? Rutilius says it is to be cut down to the ground, and many hold this to be the better opinion.

And if the owner does not remove the tree, Labeo says that the person to whom the tree is an annoyance may cut it down if he wishes, and take away the wood. 3. Under the term "trees" vines are included. 4. This interdict is available not only to the owner of a house but also to a usufructuary, because it is in his interest also that the tree should not overhang. 5. Moreover, it is to be affirmed that if a tree overhangs a house owned in common, the owners are individually entitled to this interdict, and in full, because they are also individually entitled to the vindication of servitudes. 6. The praetor says: "I forbid the use of force to prevent such a one from removing the tree, if it is your fault that you are not removing it." So first the opportunity of removing the tree is given you. If you do not do it, then he prevents you from using force against your neighbor when he wishes to remove it. 7. The praetor then says: "With respect to the tree overhanging the field of such a one from your field, if it is your fault that you will not trim it fifteen feet from the ground, then I forbid the use of force to prevent him from doing so and having the wood for himself." 8. What the praetor says, the *Law of the Twelve Tables* also wished to effect, namely that the branches of the tree should be cut round to a height of fifteen feet. And this has been effected in order that the shadow of the tree should not harm the neighbor's land. 9. The difference between the two sections of the interdict is this: If a tree overhangs a house, it is ordered to be cut down; if it overhangs a field, it is only to be trimmed up to fifteen feet from the ground.

2 POMPONIUS, *Sabinus, book 34:* If a tree from the neighbor's farm is blown over by the wind into your farm, then under the *Law of the Twelve Tables* for its removal you may properly take an action that he has no right to have the tree in that condition.

28

GATHERING ACORNS

1 ULPIAN, *Edict, book 71:* The praetor says: "I forbid the use of force to prevent such a one from gathering and taking away also on the third day the acorns which fall from his field into yours." 1. All fruits are included under the term "acorns."

29

PRODUCTION OF A FREEMAN

1 ULPIAN, *Edict, book 71:* The praetor says: "You are to produce any freeman whom you are fraudulently retaining." 1. This interdict is provided for protecting freedom, so as to ensure that freemen are not retained by anybody.

2 VENULEIUS, *Interdicts, book 4:* For those who have no means of departing are not much different from those who are slaves.

3 ULPIAN, *Edict, book 71:* And for this the *lex Fabia* makes provision also. Nor does this interdict preclude proceedings under the *lex Fabia.* For it will be possible to bring an action under this interdict and to lay an accusation under the *lex Fabia* all the same. And conversely whoever has taken an action under the *lex Fabia* will be able to avail himself of this edict all the same, especially when one party could invoke the interdict and the other take an action under the *lex Fabia.* 1. The words "any freeman" apply to every freeman, *pubes* or *impubes,* male or female, one or several, independent or dependent. We only consider one thing, whether he is free. 2. But one who [as head of the household] has persons in power will not be liable under the interdict, because he who makes use of his right is not held to hold by fraud. 3. But if

someone should retain a person whom he has ransomed from the enemy, he is in a case where he is not liable under the interdict; for he is not doing so fraudulently. Plainly, if the price is offered, the interdict applies. And if he has released him without payment, it must be said that the interdict will apply if, having once released him, he wishes to retain him. 4. If anyone should retain a son whom he does not have in power, he will usually be held to be doing so without fraud. For genuine affection results in retention without fraud, unless it is evident that fraud has been employed. Hence, the same must be said if he retains his freedman or foster son who is still *impubes* or given in noxal surrender. And generally anyone who has just cause for retaining a freeman in his keeping is not held to be doing so fraudulently. 5. If anyone retains one who wishes it, he is not held to be retaining him fraudulently. But what if he is retaining one who wishes it, but having circumvented or seduced or solicited him, not without cunning, and without good or convincing reason for doing so? Then he will rightly be said to be retaining him fraudulently. 6. Someone who does not know that a freeman is in his possession is free from fraud, but not so if he retains him after being informed. 7. Plainly, if he is uncertain whether the man is slave or free, or raises controversy about his status, one must withdraw from this interdict, and an action should be brought in a case of freedom. For it has rightly been decided that the interdict only applies when it is certain that someone is a freeman. But if his status is in question, *cognitio* by another must not be prejudiced. 8. The praetor says: "You are to produce." To produce is to bring before the public and to provide means for seeing and touching the man. Properly speaking, producing (*exhibere*) means having (*habere*) away from a secret place (*extra secretum*). 9. This interdict is available to all. For nobody is to be prohibited from favoring freedom. 10. Plainly suspect persons must be excluded from the case, if there should happen to be a person of a kind who is likely to practice collusion and calumny. 11. But if a woman or *pupillus* desire it, because of concern for a kinsman, parent, or relation by marriage, it must be said that the interdict should be granted to them. For they can subject people to accusation in a public trial to avenge injury to themselves or their household. 12. But if there are several who wish to avail themselves of the interdict, the praetor is to select the one who has the most interest and is the most suitable, and it is best to choose the plaintiff under this interdict on the grounds of his connection with the person in question, his trustworthiness, and his standing. 13. But if, after an action has been brought under this interdict, someone else wishes to bring an action under the interdict, it will be obvious that it cannot be easily granted to the other person unless something can be said about the perfidy of the previous prosecutor. So it will be when cause is shown that this interdict can be moved more than once. For in public trials it is not permitted to bring an action more than once unless the first accuser has been convicted of collusion. But if the accused person on conviction prefers to pay damages than to produce the man, it is only fair that there should be frequent recourse to the interdict against him, in favor of the same person, not barred by a defense, or of another. 14. Labeo writes that this interdict may be requested against someone who is absent, and that if he is not defended, his property is subject to restraint. 15. This interdict is perpetual.

4 VENULEIUS, *Interdicts, book 4:* If anyone retains a freeman who is ignorant of his status, he is compelled to produce him if he is retaining him fraudulently. 1. Trebatius also says that someone is not liable if he has bought a freeman in good faith as a slave and retains him. 2. At no time may a freeman be retained fraudulently, which

is so far true that some have thought that not even a small dispensation of time should be allowed for producing him, because the penalty must be paid for the deed that has already been done. 3. The interdict is not available to a creditor for the production of a debtor. For nobody is compelled to produce a debtor who is in hiding, but his goods are subject to distraint under the praetor's edict.

30

PRODUCTION OF CHILDREN AND THEIR ABDUCTION

1 ULPIAN, *Edict, book 71:* The praetor says: "You are to produce the person who is in the power of Lucius Titius, if he or she is in your keeping, or you have fraudulently arranged for him or her not to be in your keeping." 1. This interdict is provided against anyone who is required by someone to produce somebody who, he says, is in his power. And from the wording it appears that this interdict is available to the person in whose power he or she is. 2. In this interdict, the praetor does not admit consideration of the reason why the person to be produced is in the keeping of the one addressed, as he does in the interdict above, but has thought he should be produced in any event, if he is in power. 3. But if it is the mother who is retaining him, since it is sometimes the case that a son should remain in her custody rather than the father's, for the best possible reasons, the deified Pius ruled in a decree, and Marcus and Severus ruled in rescripts, that she might properly be helped by a defense. 4. In the same way, if judgment has been given that he is not in power, even if the judgment was given wrongly, a defense of judgment given will bar an action brought under this interdict, so that inquiry should be made not whether he is in power but whether judgment was given. 5. If someone wishes to take away his daughter who is married to me or wishes her to be produced for him, may a defense be granted against the interdict, if the father should happen to wish to dissolve a harmonious marriage, perhaps supported by children too? We do follow the fixed rule that truly harmonious marriages should not be disrupted by the exercise of the right of parental power. But this is to be applied by persuading the father not to exercise his parental power harshly.

2 HERMOGENIAN, *Epitome of Law, book 6:* Even more, a husband has the right to sue her father for the production of his wife and to take her away, even if her father has the wife in his power.

3 ULPIAN, *Edict, book 71:* The praetor then says: "If Lucius Titius is in the power of Lucius Titius, I forbid the use of force to prevent him from taking Lucius Titius with him." 1. The above interdicts are for production, that is to say, they are for the production of children and others of whom we have spoken above. This interdict is for taking away, so that anyone may take with him those he has a right to take. So the earlier interdict for the production of children is preparatory to this interdict; for the child was to be produced to enable someone to take him away with him. 2. This interdict is to be granted for the same reasons that we have said make the interdict for the production of children available. So whatever we have said there is to be taken as having been said here. 3. This interdict is inapplicable against the son himself, if someone should wish to take him away; but in any case there should be somebody to defend him under the interdict. However, the interdict is inapplicable here, and the decision of the praetor will take its place, so that it will be argued before him whether or not someone is in power. 4. Julian says that whenever this interdict is moved for taking away a son, or *cognitio* is held, and the son in question is *impubes*, the matter should sometimes be deferred to the time of puberty, and sometimes decided immediately. This is to be decided by consideration of the persons between whom there is controversy and of the type of case. For if he who says he is the father should be a man of reputation, prudence, and proven trustworthiness, he will have custody of the *impubes* until the day of the suit; but if the man who raises controversy is a low-class false accuser of known rascality, the *cognitio* should take place at once. Again, if the man who denies that the *impubes* is in the power of another is a man of probity in every way, a tutor either under the will or assigned to the *pupillus* by the praetor, he will look after the person in his

keeping until the day of the suit; but if he who says he is the father is suspected of being a false accuser it will not be right to defer the suit. But if both parties are personally suspect as being unsound or of bad character, it will not be inappropriate to arrange for someone in whose keeping the boy might be educated and defer the controversy to the time of puberty, to ensure that collusion or inexperience of one or other contestant does not result in a head of a household being assigned power over a stranger, or a stranger being appointed in place of a head of a household. 5. Even if a father fully proves that a son is in his power, nevertheless, on cause being shown, the mother will get preference in retaining him, and this is contained in certain decrees of the deified Pius. For the mother may have obtained custody of the son without diminution of parental power on the father's side on the grounds of the father's rascality. 6. Under this interdict, until the matter is brought to judgment, the praetor orders a woman, a *praetextatus* and one who is nearest in age to a *praetextatus* to be left in the keeping of the *mater familias*. Nearest in age to a *praetextatus* we call one who has entered the age of puberty. By *mater familias* you must understand a woman of known reputation.

4 AFRICANUS, *Questions, book 4:* If someone who says he is head of a household is declared by me to be in my power and to have accepted an inheritance at my direction, he says that not only an action on inheritance may be brought, but recourse may be had to the interdict for taking away a son.

5 VENULEIUS, *Interdicts, book 4:* If a son is in someone's keeping of his own accord, this interdict will be inapplicable, because the son is more in his own keeping than in that of the person against whom the interdict would be invoked, since he has freedom to go away or stay, unless there is a controversy between two who claim to be fathers, and one wishes him to be produced by the other.

31

POSSESSION

1 ULPIAN, *Edict, book 72:* The praetor says: "From wherever the man in question has been for the greater part of this year, I forbid the use of force for such a one to take him away." 1. This interdict is applicable to the possession of movable property. It has come to have a force equal to the interdict for the possession of land, which applies to property connected with the ground. Hence, in this interdict too, the person prevails who has possession not by force, stealth, or *precarium*, when he is being troubled for it by his adversary.

32

MOVING

1 ULPIAN, *Edict, book 73:* The praetor says: "If the man in question is not included in the agreement between you and the plaintiff, according to which all things introduced or imported into the dwelling in question, or born or made there, should be a pledge to you for the rent of the dwelling; or if he is included among those things but the rent has been paid to you, or security given, or if it is your fault that security has not been given, I forbid the use of force so as to prevent the person who brought him in by way of pledge from taking him away from there." 1. This interdict is provided for a lodger who wishes to move after paying the rent. It is not available to a farm tenant. 2. Relief can also be given in this matter *extra ordinem*. So this interdict is infrequent. 3. But if someone has gratuitous lodging, this interdict will effectively lie

in his favor. 4. Even if the rent is not yet due, Labeo says that this interdict is inapplicable unless the lodger is prepared to pay the rent. Furthermore, if he has paid the rent for six months and six months' rent is owing, he will not effectively invoke the interdict unless he pays the following six months' rent, always provided that a special agreement has been made in renting the house that he may not move before the end of a year, or of a certain period. The same applies if someone has rented a house for several years and the time has not yet elapsed. For since the pledges are given as security for the entire lease, it follows that one should say the interdict does not apply unless they are released. 5. It must be noted that the praetor has not here insisted that the property should be among the goods of the lessee, or that it should be a pledge, but that it should have been brought in by way of pledge. So even if the property is different and of a kind that may not be retained by way of pledge, still if it has been brought in by way of pledge, this interdict will have scope. But what has not even been brought in by way of pledge cannot be retained by the landlord either. 6. This interdict is perpetual and is given against successors and to successors.

2 GAIUS, *Provincial Edict, book 26:* This interdict will undoubtedly lie effectively in favor of a lodger even with respect to those things that are not his own, but happen to have been lent or hired to him or left in his keeping.

33

THE SALVIAN INTERDICT

1 JULIAN, *Digest, book 49:* If a tenant brings a female slave on the farm by way of pledge and sells her, then to secure what is born to her when she is in the keeping of the buyer, an effective interdict should be granted. 1. If the tenant has by way of pledge brought property to a farm belonging to two persons, so as to provide security to each in full, they will rightly be able to avail themselves individually of the Salvian Interdict against a stranger. But if this interdict is granted between themselves, the case of the possessor will be better. And if it comes to proceedings, so that the property is made over as pledge to each in proportion to share, an *utilis actio* will have to be granted both against strangers and between themselves by which they will each secure half shares of a single possession. 2. It will be agreed that the same principle should be observed if a tenant brings in by way of pledge a thing which he had in common with someone else, so that the right of suing will be given for half the pledge.

2 ULPIAN, *Edict, book 73:* In the Salvian Interdict, if someone has brought in pledges to a farm owned by two persons in common, the possessor will prevail, and they must have recourse to a Servian action.

BOOK FORTY-FOUR

1

DEFENSES, *PRAESCRIPTIONES*, AND PREJUDGMENTS

1 ULPIAN, *Edict, book 4:* Also he who pleads a defense is also considered to bring proceedings; for in a defense the defendant is a plaintiff.

2 ULPIAN, *Edict, book 74:* A defense has been described as some kind of bar which used to be raised against the action of any party in order to shut out whatever has been introduced into the *intentio* or into the condemnation. 1. Replications are nothing else than defenses which come from the side of the plaintiff; and, indeed, they are required in order to shut out defenses (*exceptiones*); for a replication is always raised in order to repulse a defense. 2. It ought to be held that every defense or replication is exclusionary; a defense bars the plaintiff, a replication bars the defendant. 3. However, even against a replication, it is usual to allow a triplication, and against a triplication a further [pleading], and thereafter names are multiplied according as either the defendant or the plaintiff raises a defense. 4. Naturally, we are wont to say that certain defenses are dilatory, and others are peremptory; for instance, a defense which suspends the action is dilatory, as, for example, a defense objecting to a procurator is dilatory; for he who alleges that the action may not be brought in the name of the procurator is not totally denying the suit, but is barring the person.

3 GAIUS, *Provincial Edict, book 1:* Defenses are either perpetual and peremptory, or temporary and dilatory. Those defenses which are available at any time and which cannot be avoided are permanent and peremptory, as, for example, the defense of fraud and the defense of *res judicata*, and where something is alleged to have been done in breach of a statute or a *senatus consultum*, as also the defense of the permanent agreed pact, that is, the defense that money shall not be claimed at all. Temporary and dilatory defenses are those which are not available at any time, but can be avoided, such as the defense of the temporary agreed pact, that is, that no action shall be brought within, say, five years; defenses affecting a procurator are also dilatory, and they can be avoided.

4 PAUL, *Edict, book 20:* If, in the case of a *pupillus*, to whom money which is owing to him was paid without authority of his tutor, it is asked whether he ought to be met with a defense of fraud, then the question to be looked into is whether at the time that he makes his claim he still has the money or has anything acquired with it.

5 PAUL, *Edict, book 18:* A person who will allege that he has taken an oath can avail himself of other defenses together with the defense of oath, or of the other defenses alone; for the use of several defenses is permitted.

6 PAUL, *Edict, book 71:* If a legatee claims property bequeathed to him, a defense of fraud on the part of the testator is allowed; for just as the heir who succeeds by

universal title is barred by such a defense, so the legatee too ought to be barred as successor, so to speak, of a single item.

7 PAUL, *Plautius, book 3:* Defenses which attach to the person of someone, do not transmit to others, for example, the defense which a partner or a parent or a patron has "to pay what he is able to afford," is not available to his surety; hence, a surety furnished by a husband after dissolution of his marriage is condemned to pay the full amount with respect of the dowry. 1. However, defenses which relate to the issue are available to sureties too, such as the defense of *res judicata*, of fraud, of oath, and the defense that a transaction was concluded under duress. Consequently, if a plaintiff has made a pact in respect to the issue itself (*in rem*), the defense is available to the surety. The defense of intercession too, as well as the defense that a claim is being made to burden liberty, is also available to a surety. The position is the same if someone has on behalf of a son-in-power guaranteed something in breach of the *senatus consultum*, or has stood surety for a *minor* under the age of twenty-five who has been defrauded; but if he has been deceived as to property, then neither has he himself a remedy before he has been granted *restitutio in integrum*, nor ought a defense to be allowed to his surety.

8 PAUL, *Plautius, book 14:* No one is prohibited from availing himself of several defenses, however different they may be.

9 MARCELLUS, *Digest, book 1:* A person against whom proceedings are brought is surely not considered to be admitting the claim of his adversary merely because he pleads a defense.

10 MODESTINUS, *Replies, book 12:* Modestinus replied: An issue decided between third parties does not affect others, and if a person against whom a judgment was given became heir to a person against whom the judgment was not pronounced, an action on the inheritance brought by him cannot be barred on the strength of the judgment to which he raised a defense when litigating in his own name before he became heir.

11 MODESTINUS, *Replies, book 13:* A person who acknowledged documents as being genuine, paid after judgment of a court [against him]; if, subsequently when the truth of the matter has been ascertained and the documents are found to be false, he wishes to prosecute and prove that the documents in terms of which he had been sued were false, I ask whether a defense can be pleaded against him, when he had subscribed documents in terms of a direction or an interlocutory order of the court, since it is clearly provided in imperial constitutions that even though a judgment in a matter had been given on the basis of false documents, a defense of *res judicata* cannot be raised if the documents are subsequently found to be false. Modestinus replied that there is no ground for a defense, because payment was made in error or a *cautio* to pay, if given, is framed on the basis of those documents which are now alleged to be false.

12 ULPIAN, *Edict, book 38:* Generally, in prejudgments, the person who makes a declaration in accordance with what he is claiming occupies the position of plaintiff.

13 JULIAN, *Digest, book 50:* If after joinder of issue in a claim for an inheritance, individual items of property are claimed, it is accepted that the defense "that no prejudgment be made as to the inheritance" is not competent; for defenses of this kind have been designed in respect of a future action, not in respect of one already made.

14 ALFENUS VARUS, *Digest, book 2:* A son-in-power sold a slave belonging to his *peculium* and entered into a stipulation for the price; the said slave was redhibited and afterward died. And the son's father claimed from the purchaser the money for which the son had stipulated. It was ruled that it was equitable that a defense *in factum* be given against him "that the money was promised in respect of the said slave who has been redhibited."

15 JULIAN, *Urseius Ferox, book 4:* A replication of fraud ought not to be granted

against a defense of oath, seeing that the praetor ought to see to it that the oath of a person be not questioned.

16 AFRICANUS, *Questions, book 9:* You are in possession of the Titian land, as to the ownership of which there is litigation between me and you, and, in addition, I state that there is due to the said land a right of way through the Sempronian land which is acknowledged to be yours. If I claim the right of way, he considered that a defense "that no prejudgment be made as to the land" would be of benefit to you, that is to say, that I shall in no way proceed to prove that the right of way is due to me before I shall first have proved that the Titian land is mine.

17 PAUL, *Edict, book 70:* But if he first claims the right of way and thereafter the Titian land, a defense will not be effective, because they are different matters as well as different grounds of relief.

18 AFRICANUS, *Questions, book 9:* I claim a part of land from you which you state to be entirely yours, and at the same time I also wish to bring before the same judge an action for dividing common property; moreover, if I should wish to recover from you the fruits of land of which you are in possession and which I allege to be my property; the question was raised whether a defense "that a prejudgment be not made as to the land or to a part of it" will avail or whether it ought to be disallowed. And in both cases, he considers that the praetor ought to intervene and ought not to permit the claimant to institute actions of this kind before the ownership is determined.

19 MARCIAN, *Institutes, book 13:* All defenses which are competent to a debtor are also competent to his surety, even against the wishes of the debtor.

20 PAUL, *Drafting Formulae, sole book:* Defenses are pleaded either because what should be done has been done or because what should not have been done has been done or because what should have been done has not been done; the defense of property sold and delivered and the defense of *res judicata* are granted because what should have been done has been done; the defense of fraud is given because what should not have been done has been done; a defense such as that *bonorum possessio* has not been granted is given because what should have been done has not been done.

21 NERATIUS, *Parchments, book 4:* Prejudice to a matter of greater monetary value is held to occur, when an issue, which is connected either wholly or in some part with the issue of greater value, is brought to trial.

22 PAUL, *Readings, sole book:* A defense is a proceeding which at times relieves a person from condemnation, and at times reduces the condemnation. 1. A replication is a counter-defense, a defense to a defense, as it were.

23 LABEO, *Plausible Views, Epitomized by Paul, book 6:* Paul states: If a person has placed a statue in a town with the intent that it should become the property of the town and he then wishes to reclaim it, he ought to be barred by granting a defense *in factum.*

24 HERMOGENIAN, *Epitome of Law, book 6:* A son-in-power acquires an exception of oath for his father, if he should swear that his father is not obliged to give anything.

2

THE DEFENSE OF *RES JUDICATA*

1 ULPIAN, *Edict, book 2:* Since cases decided between some persons cause no prejudice to third parties, an action based on a will, in which freedom or a legacy was given, can be brought, even if the will is held to be rescinded or to be invalidated or to be not lawful; and even if the said legatee were defeated, prejudice is not caused to the gift of freedom.

2 ULPIAN, *Edict, book 13:* A person who brought an action against the heir of one who has passed him, an [emancipated] son, over in his will, was barred by a defense "and if the testamentary instrument was not of a condition that *bonorum possessio* could be granted against it.": When an emancipated son neglected to claim *bonorum possessio*, it is not unjust that it be restored to him so that he may bring an action against the heir; and so Julian has written in the fourth book of his *Digest.*

3 ULPIAN, *Edict, book 15:* In the third book of his *Digest*, Julian gave an opinion that a defense of *res judicata* will avail whenever the same issue is raised again between the same persons; and, consequently, even if a person after having claimed individual items of property, claims the inheritance, or conversely, he will be barred by the defense.

4 ULPIAN, *Edict, book 72:* The defense of *res judicata* is regarded as tacitly including all persons who usually bring a matter to trial.

5 ULPIAN, *Edict, book 74:* Also a person who does not bring the same action which he had brought initially is regarded as bringing suit on the same issue, even if he brings another action but it is one dealing with the same issue, as, for instance, if someone who was bringing an action on mandate, when his adversary had promised him to appear at the trial, should bring an action for unauthorized administration, or a *condictio*, in respect of the same matter, he is bringing suit on the same issue. And only he who does not pursue the same object at all will be rightly described as not bringing proceedings on the same issue; moreover, when someone changes his action and institutes proceedings, then, as long as he is suing on the same issue, he is regarded as bringing suit on the same issue, even though he is doing so with a different kind of action from the one he had first instituted.

6 PAUL, *Edict, book 70:* It has been accepted for good reason that in individual disputes a single action and one final judgment is sufficient, lest otherwise the ambit of suits be greatly increased and cause very great and insurmountable difficulty, especially if different judgments were pronounced. To be subject to a defense of *res judicata* is therefore frequent.

7 ULPIAN, *Edict, book 75:* If a person should claim a part after he had claimed the whole, the defense of *res judicata* bars him; for the part is included in the whole; for it is considered to be the same issue even if a part is claimed of that which was claimed in its entirety. And it is immaterial whether the question concerns a thing or an amount or a right. Accordingly, if a person has claimed land and thereafter claims either a divided share or an undivided share of it, it will have to be concluded that the defense avails. Accordingly also, if you propose to me that I should claim a certain area of the land which I have already claimed, the defense will avail. The same conclusion will have to be accepted also if two articles have been claimed, and afterward either of them is claimed; for the defense will avail. Likewise, if someone claimed land, and afterward claims trees felled on that land, or if he claimed a block of houses, and thereafter claims the site or the timber or the stones; similarly, if I have claimed a ship, and thereafter were to claim individual boards. 1. If I have claimed a female slave who is pregnant and after issue has been joined in the case she conceived and gave birth, and afterward I should claim the child, the important question is whether I am considered to be claiming the same or a different thing. And, indeed, it can be laid down that the same thing is being claimed whenever what was demanded before the previous judge is being demanded before the subsequent judge. 2. In nearly all these cases, therefore, the defense will avail; but it is different in the case of bricks and timber; for if he, who claims a block of houses, should then claim the bricks or the timber or any other material as his property, he is in such a position that he is regarded as claiming a different thing; for, indeed, the owner of the block of houses, is not in all cases also owner of the bricks; moreover, that which had been joined to the building of another can be claimed by the owner with a *vindicatio* when separated. 3. In respect of fruit the question is the same as in respect of offspring; for these things were not yet in existence, but derive later from that which was claimed, and the better view is that that defense will not avail. Clearly, if either the fruit or even the offspring was included and valued in a claim for restitution, the ruling which will follow is that the defense must be raised. 4. And, generally, as stated by Julian, the defense of *res judicata* avails whenever the same issue is raised again between the same persons, albeit in a different kind of action. And, accordingly, if a person after having claimed an inheritance should claim individual items of the estate, or after having claimed the individual items should claim the inheritance, he will be barred by the defense. 5. The same rule will have to be adopted also if someone has claimed a debt from a debtor of an estate and thereupon should claim the inheritance, or conversely if he first claimed the

inheritance and afterward should claim the debt; for here too the defense will avail; for when I claim the inheritance, both the property and all the actions which belong to the inheritance are considered to be included in the claim.

8 JULIAN, *Digest, book 51:* Likewise, if a person, after claiming a portion of land, brings an action for dividing the inheritance or for dividing the common property, he will equally be barred by the defense.

9 ULPIAN, *Edict, book 75:* If I were to claim an inheritance from you, when you were in possession of no part of it, and thereafter, when you do commence to be in possession of something from it, I should [again] claim the inheritance, does that defense avail? And I would think that the defense does not avail, whether it had been decided [in the past case] that the inheritance belonged to me or whether my adversary had been absolved on the ground that he possessed no part of it. 1. If someone shall have defended a claim for land which he considered to be in his possession and afterward purchased it, if the matter had been decided in favor of the plaintiff, is he now obliged to return the land? And Neratius stated that if the defense of *res judicata* is pleaded when the plaintiff sued the second time, he ought to replicate that the matter had been decided in his favor. 2. Julian writes that the defense of *res judicata* usually passes from the person of the seller to the purchaser, but ought not again to revert from the purchaser to the seller. Hence, if you sold property belonging to an inheritance, and I claimed the said property from the purchaser and I succeeded, I may not, if you then claim the property, plead the defense "but if the matter has not been decided between me and the person to whom you have sold."

10 JULIAN, *Digest, book 51:* Likewise, if I should have been defeated, you will not have the defense against me.

11 ULPIAN, *Edict, book 75:* If the mother of a son who died an *impubes* brought a *vindicatio* for property in accordance with the *senatus consultum* on the ground that she considered that the will of his father was rescinded and that no one has been substituted, and she was defeated because the father's will had not been rescinded; but subsequently, when the will dealing with the pupillary substitution was opened, it appeared that no substitute to the *impubes* had been provided, Neratius said that if she were to claim the inheritance again, the defense of *res judicata* will bar her. I have no doubt that the defense of *res judicata* does bar her, but she ought to be granted relief on the ground that she had brought her action on the sole ground that the will was rescinded. 1. Moreover, Celsus too writes that if I shall have claimed a slave whom I thought to be mine on the ground that he was delivered to me by someone, whereas in fact he was mine on the ground of inheritance, the defense will avail against me if I were to sue again. 2. But if someone claims that land is his on the ground that Titius delivered it to him, and if thereafter he claims on another ground and specifies that ground, he ought not to be barred by the defense. 3. Likewise, Julian writes that when you and I became heirs to Titius, if you claimed a portion of land from Sempronius the whole of which you alleged belonged to the inheritance and you lost the case and thereafter I purchased the same portion from Sempronius, the exception will avail against you if you bring an action against me for dividing the inheritance, because the matter has been decided between you and my vendor; for also if I had previously claimed the same portion of land and then brought an action for dividing the inheritance, the defense "that the matter has been decided between me and you" would avail. 4. The source of the claim also causes the issue to be the same. But if I happen to have claimed land or a slave and subsequently, after the claim, a new but different ground of action became available to me which would accord me the ownership, that defense will not debar me, unless in the intervening period the interrupted ownership happened to return to me by some right of *postliminium.* For what if the slave whom I had claimed shall have been captured by the enemy and then recovered by *postliminium*? Here I shall be barred by the defense, because the issue is considered to be the same. But if I shall have gained the ownership on a different ground, the defense will not avail; and, accordingly, if property happens to have been bequeathed to me subject to a condition and then, after acquiring the ownership in the ensuing period, I claim the property, and thereafter when the condition of the legacy is fulfilled I claim it again, I would consider that the defense does not avail; for the ground of the previous ownership was different, and then this new ground supervened. 5. Therefore, the ownership acquired subsequently, indeed, creates a different issue. But a change

of opinion on the part of a claimant does not. Say, for example, he was of the opinion that he acquired ownership on the ground of an inheritance; he changed his opinion and started to think that it was on the ground of a donation; this situation does not give rise to a new claim; for whatever was the kind of ownership he had and from whatever source it was acquired, he has brought the matter to joinder of issue in his first *vindicatio*. 6. If someone claimed a right of way in person and afterward claims a right of way with cattle, I consider that the stronger argument must be that one thing appeared to be claimed then, and another now, and, accordingly, the defense of *res judicata* ceases to be of application. 7. We follow this rule that in the case of the defense of *res judicata*, those persons would be included in the role of plaintiff who bring the matter to trial; among these will be a procurator to whom a mandate was given, a tutor, the curator of a lunatic or of a *pupillus*, the person who acts for citizens of a town; on the side of the defendant, moreover, a defender will also be included, because the person who brings the action against the defender, brings the matter to trial. 8. If someone has claimed a slave from a son-in-power and afterward claims the same slave from the father, this defense will have application. 9. If I shall have brought an action against a neighbor for warding off rainwater and afterward one or other of us sold our land and the purchaser brings the action or is sued, this defense will avail, but only in respect of the work which had already been done on the land when [my] action was allowed. 10. Likewise, if Titius gave property, which he had claimed from you, in pledge to Seius, and then Seius bring an action on pledge against you, a distinction must be drawn according to when Titius had given the pledge; and, indeed, if it was before he had claimed the property, the defense ought not to bar him [Seius]; for both he [Titius] ought to have his action, and I [Seius] ought to have my action on pledge unimpaired. But if he gave the pledge after he claimed the property, the better view is that the defense of *res judicata* avails.

12 PAUL, *Edict, book 70:* When the question is asked whether this defense avails or not, an inquiry must be made as to whether it is the same property,

13 ULPIAN, *Edict, book 75:* the same amount, the same right,

14 PAUL, *Edict, book 70:* and the same ground for claiming and the same parties; unless all these exist together, it is a different issue. For this defense the same property is surely not considered to be the continuation of the original quality or quantity without any addition or subtraction, but more broadly according to its general utility. 1. A person who had part of a usufruct claimed the whole; if he were subsequently to claim an accruing part which has accrued, he is not defeated by the defense, because a usufruct accrues not to a part, but to a person. 2. Personal actions differ from real actions in this respect that when the same thing is due to me from the same person, cause of action follows the individual obligation, and none of them is prejudiced by a claim for the other; but when I bring a real action without specifying the ground on which I allege the property to be mine, all the grounds are covered by the same action; for property cannot be mine more than once, but it can be due several times. 3. If someone brought an interdict for possession and afterward brings a real action, he is not debarred by the defense, since in the interdict it is the possession which is in issue, while in the action it is the ownership.

15 GAIUS, *Provincial Edict, book 30:* If there is a dispute between me and you with respect to an inheritance, and you are in possession of certain articles belonging to it and I of others, there is nothing to prohibit both me claiming the inheritance from you, and you in turn claiming it from me. But if you begin your claim against me after judgment has been given, then it is of importance whether the inheritance has been declared to be mine or the converse; if it is declared to be mine, the defense of *res judicata* will avail against you, because by the very fact that it has been declared to be mine, the contrary appears to have been decided that it is not yours; but if it has been declared not to be mine, no judgment is understood to have been made with respect to your right, because the inheritance may be neither mine nor yours.

16 JULIAN, *Digest, book 51:* For it is plainly most inequitable that the defense of *res judicata* should benefit the person against whom the judgment has been given.

17 GAIUS, *Provincial Edict, book 30:* If I have claimed my property from you, but you have been absolved on the ground that you have proved that you have ceased to be in possession of it without wrongful intent on your part, and subsequently you acquired possession and I claim the property from you, the defense of *res judicata* will not avail against me.

18 ULPIAN, *Edict, book 80:* If someone has brought an action for production of a thing and afterward the defendant was absolved because he was not in possession of it, and the owner again brings the action when the defendant had acquired possession, the latter shall not have the defense of *res judicata,* because it is a different issue.

19 MARCELLUS, *Digest, book 19:* A person gave the same property in pledge to two persons at different periods; the latter of the two brought an action on pledge against the former and succeeded; subsequently, he commenced to bring a similar action; the question was raised whether the defense of *res judicata* would avail. If he had pleaded the defense in respect of the property pledged to him and added nothing else which was new and relevant, the defense will without doubt avail; for he is bringing the same issue to trial.

20 POMPONIUS, *Sabinus, book 16:* If an action on a will has been brought against the heir by one to whom all the silver had been bequeathed and who considered that only the tables were bequeathed to him and that the trial gave a valuation of them only, and afterward he were to claim the bequeathed silver as well, Trebatius said that the defense would not avail against him, because there the [previous] claim was neither for what the plaintiff considered he was claiming nor for what the judge could have taken into account at the trial.

21 POMPONIUS, *Sabinus, book 31:* If, when silver had been bequeathed to me in a will, I shall have brought an action against the heir, and subsequently when the codicils were produced it appears that the clothes had also been bequeathed to me, the issue of the clothes has not been brought to joinder in the earlier action, since neither the litigants nor the judge understood that anything besides the silver was the subject of the action. 1. If I shall have claimed a flock and the number of the flock either increased or decreased and I were again to claim the said flock, the defense will avail against me. But if I claim an individual head of cattle of the flock, I consider that the defense will prevail, if that head of cattle was part of the flock. 2. If you shall have claimed that Stichus and Pamphilus belonged to you and after your adversary had been absolved you were to claim from the same person that Stichus is yours, it is agreed that the defense will avail against you. 3. If I shall have claimed that land belonged to me and then I subsequently claim a usufruct in the same land on the ground that it is mine for the same reason that the land is mine, the defense will avail against me, because the person who owns the land cannot claim by *vindicatio* that the usufruct in it is his. But if I have claimed a usufruct on the ground that it is mine, and afterward on acquiring the ownership, I should again sue for the usufruct, it can be said that it is a different issue, seeing that after I obtained the ownership of the land, the previous usufruct ceased to be mine and began to be mine again by my right of ownership which is, so to speak, a new ground. 4. If you shall have stood surety for my slave and an action on the *peculium* was brought against me, the defense of *res judicata* must be allowed to you if an action on that account is afterward brought against you.

22 PAUL, *Edict, book 31:* If an action on deposit has been brought against one heir, the action may nonetheless be brought against the remaining heirs too, and the defense of *res judicata* will not be available to them; for although the same issue is involved in all the actions, nevertheless, the change in persons against each of whom an action is brought in his own name makes the issue different for each of them. Even if an action for fraud on the part of the deceased has been brought against his heir and thereafter an action for fraud on the part of the heir himself, the defense of *res judicata* will not avail, because the action is on a different issue.

23 ULPIAN, *Disputations, book 3:* If an action has been brought to trial and interest alone was claimed, it need not be feared that a defense of *res judicata* will avail in respect of a claim for the capital, because it is neither competent, nor can it cause prejudice if pleaded. The position will be the same if someone wishes to claim the interest alone in an action of good faith; for the interest for future periods accrues no less, and as long as the contract of good faith continues, the interest will accrue.

24 JULIAN, *Digest, book 9:* If someone purchased property from a person who is not owner and soon thereafter was absolved in a claim by the owner and thereupon lost possession and claimed it from the owner, he will against a defense "that the property was not his" be assisted with a replication "but if the issue has not been decided."

25 JULIAN, *Digest, book 51:* If a person who was not heir claimed an inheritance and afterward when he became heir he were to claim the same inheritance, he will not be barred by the defense of *res judicata.* 1. It is in the power of a purchaser within six months whether he prefers to bring an action for rescission or whether to claim for an award to be made to the extent that the value of the slave was less when it was sold. For the latter action also covers rescission if the defect of the slave was such that the plaintiff would on that ground not have purchased him;

therefore, it may rightly be said that the person who brought either of those actions, is barred by the defense of *res judicata* if he subsequently brings the other action. 2. If you have undertaken the administration of my affairs and claimed land on my behalf and subsequently I failed to ratify this claim by you but instructed you to claim the same land afresh, the defense of *res judicata* will not avail; for when the instruction was given, a different issue came into being. The position is the same if a real action has been brought and not a personal action.

26 AFRICANUS, *Questions, book 9:* I brought an action against you claiming that I had a right to build my house up to ten feet higher; thereafter I bring an action claiming that I had a right to build up to twenty feet higher; without a doubt the defense of *res judicata* will avail. But even if I again bring an action that I have a right to build another ten feet higher, the exception will avail; for the higher section cannot be available by right unless the lower section is also rightfully available. 1. Likewise, if after claiming land, an island which has arisen in a river in that area is afterward claimed, the defense will avail.

27 NERATIUS, *Parchments, book 7:* When the question is asked as to whether it is the same issue, the following must be considered: the persons, the matter itself for which action is brought, the proximate ground of the action. And the reason for which a person considered that that ground of action was competent to him is not relevant, equally as if a person, after judgment had been given against him, had found new documents for his case.

28 PAPINIAN, *Questions, book 27:* The defense of *res judicata* will bar a person who succeeded to the ownership of the one who brought the action.

29 PAPINIAN, *Opinions, book 11:* The defense of *res judicata* can, indeed, not avail against a co-heir who has not been a litigating party, and it appears that one who has not yet been manumitted in terms of a *fideicommissum* is not recalled to slavery after a judgment in favor of his liberty has been given, but the verdict of the praetor in that matter ought to be upheld even though it cannot be produced on behalf of the defeated party; for when a question of an unduteous will bound one of the co-heirs or even when one of two persons suing separately obtained it, it was accepted that verdicts in favor of freedom continued of effect in such a way, however, that the discretion of the judge may be appealed to for an indemnity in favor of the winning party and a future manumitter. 1. If a debtor without notifying his creditor brought suit in respect of the ownership of property which he had given in pledge and obtained an adverse judgment, the creditor will not be considered to have succeeded to the position of the defeated debtor, since the agreement of pledge preceded the judgment.

30 PAUL, *Questions, book 14:* A person who can be the legal intestate heir was instituted as heir to a sixth part, and when raising a question concerning the validity of the will, he claimed a half share of the inheritance from one of the instituted heirs, but he did not succeed. In that suit, he is considered to have claimed the sixth part too, and consequently, the defense of *res judicata* will avail against him, if he commenced an action under the will against the same person for that share. 1. Latinus Largus wrote that since a settlement respecting an inheritance was reached between Maevius to whom it belonged and Titius who had initiated the dispute, and transfer of property belonging to the inheritance was made to Maevius, the heir by Titius, and in this transfer he in terms of the agreement delivered land too which was his own and which many years before he had bound in pledge to the grandfather of the said heir Maevius, and which he afterward gave in pledge to someone else. Under these circumstances, the later creditor of Titius pursued his right and succeeded. After this judgment, the heir Maevius found among the property of his grandfather a chirograph from the said Titius written many years before from which it appeared that the said land which had come under the terms of settlement had also been pledged to the grandfather by the same Titius. Since, therefore, it is clear that the said land in respect of which Maevius had been defeated had first been given in pledge to the grandfather of Maevius, I ask whether the right of his grandfather of which he did not know at the time when the action concerning the said land was brought can be claimed and whether no defense can be pleaded. My reply is: If the suit concerned the ownership of the land and the second plaintiff was pronounced owner, we should say that the defense of *res judicata* will avail against the claim of him who was defeated in the previous action, seeing that when the plaintiff establishes his claim, it appears

that the former's right was also in issue. But if a possessor who has been absolved were to lose his possession and claim the said property from the person who did not win previously, the defense would not avail against him; for it would seem that in that action against him nothing had been decided as to his right. Moreover, when the action on pledge was brought against the first creditor, it can be that the right of the possessor was not in issue, because in a pledge it surely does not follow that what he will here prove was pledged to him was not pledged to another, as in a question of ownership where what is mine is not that of another. And it is more correct to say that the defense will not avail, since the right of the possessor was not in issue, but solely the obligation of pledge. Moreover, in the case put to me I am more influenced by the question whether the right of pledge was extinguished when the ownership was obtained; for the pledge cannot continue when the creditor was made owner. However, the action on pledge is competent; for it is true that the property was given in pledge and satisfaction has not occurred, and, therefore, I am of the opinion that the defense of *res judicata* is not available.

31 PAUL, *Replies, book 3:* Paul replied to one who had brought a real action and did not succeed, that the defense of *res judicata* does not bar him if he subsequently sues by *condictio.*

3

THE VARIOUS PERIODS OF *PRAESCRIPTIONES* AND THE ACCESSION OF POSSESSION

1 ULPIAN, *Edict, book 74:* Because the question of *dies utiles* is frequent, let us see what it means to have a power to sue. And, indeed, the principal requirement is that there be a power to bring an action. And it is not sufficient to have a power to go to court against a defendant or to have someone fit to defend himself, unless the plaintiff too is not impeded by any appropriate reason from suing. Accordingly, whether he be in the hands of the enemy or absent on affairs of the state or in prison, or detained in some place or region by a storm, so that he can neither bring the action nor instruct someone to do so, he has no power to sue. Clearly, a person who is prevented by illness from being able to give instructions is in the position of having a power to sue. It surely escapes no one's mind that a person who did not have a praetor available does not have a power to sue; consequently, only the days on which the praetor exercised jurisdiction are counted.

2 MARCELLUS, *Digest, book 6:* The question arises whether or not in the dates appointed for judicial proceedings intercalary days ought to be for the benefit of the person against whom judgment has been given. Likewise, the date on which a suit is terminated must without doubt be computed in such a manner that the time of the suit is regarded as increased by an intercalary day, for instance, if it is a question concerning usucapion which is usually completed after a specified period, or concerning actions which come to an end after a fixed term, such as the aedilitian and most other actions. And if someone sold land on condition that if the price was not paid within thirty days the land shall become unbought, an intercalary day will be for the benefit of the purchaser. My view is to the contrary.

3 MODESTINUS, *Distinctions, book 6:* It is clear that prescription of a long period is of application as much to land as to slaves.

4 JAVOLENUS, *Letters, book 7:* If a slave belonging to an inheritance or to one who is in the power of the enemy accepted security, the date of the security will begin to run at once; for we must inquire whether there was a power to proceed against the person who was bound and not whether he who brought the matter to an obligation could himself have sued; otherwise, it would be most inequitable that the obligations of debtors by whom nothing was done to impede action being taken against them should be prolonged because of the position of the plaintiffs.

5 ULPIAN, *Disputations, book 3:* It must be examined whether an impediment on

the part of a seller, or of a donor or of one who has bequeathed property to me, will prejudice me, if such predecessor of mine happened to have no lawful start to his possession. And I am of the opinion that it neither prejudices nor benefits me; for in the end I can usucapt even that which my predecessor in title could not have usucapted. 1. Facts were put forward in which a certain person who had given property in pledge sold the said property and his heir redeemed it; it is asked whether the heir can use the defense of long possession against the enforcement of the pledge. I said that this heir who redeemed the pledge from a third party can use the defense because he succeeded to the position of the third party, and not to that of the person who had given the pledge, just as in the case where he first redeemed the pledge and thereupon became heir in this way.

6 AFRICANUS, *Questions, book 9:* If I sold the same property separately to two persons, the possession which preceded both sales benefits only the first purchaser to whom it has also been delivered. Moreover, also if I sold property to you and buy it back from you and sell it to Titius, my entire period of possession as well as yours will accrue to Titius; that is so, because both you ought to hand over the possession to me and I to him. 1. I sold a slave to you, and it was agreed that unless the money was paid by a specified date, the slave would be unbought; when this did occur, it was asked what the opinion was as to the accession of your period of possession. The reply was that when cancellation took place the following is what is to apply; for he is to be treated as if the slave had been sold back to me, so that, of course, if the seller obtained possession afterward, this very period as well as that which preceded the sale, and what is more, the accession is joined to that period when the possession was with the person by whom the slave has been given back.

7 MARCIAN, *Institutes, book 3:* If for several years someone has fished by himself in a side stream of a public river, he may prevent another person from exercising the same right.

8 ULPIAN, *Rules, book 1:* It is right that in accession of possession also the period during which a slave is in flight is to benefit the master.

9 MARCIAN, *Rules, book 5:* It is provided in certain rescripts of the Emperor Antoninus the Great, that prescription of long possession has application in the case of movable property.

10 PAPINIAN, *Replies, book 13:* Within four years an informant of an heirless estate withdrew the notification made by him; this earlier notification will not assist a second informant who after four years comes forward against being barred by prescription of time, unless collusion on the part of the previous informant is discovered; if this is revealed, prescription, and also inquiry into the matter, is terminated. 1. The period of four years which has been laid down for notifying an heirless estate is counted not from the date of knowledge of it by men, but from the date of the actual existence of the ownerless estate. However, the four years will be counted from after the date the will was rescinded and possession on intestacy was repudiated by everyone who could have claimed by degrees or from the end of the period which has been laid down for each.

11 PAPINIAN, *Definitions, book 2:* When an heir succeeds to all the rights of a deceased, he does not by his ignorance exclude impediments on the part of the deceased, for example, when he [the deceased] possessed the property of another knowingly or secretly or by tenancy at will; for although tenancy by will does not bind an heir who is unaware of it, nor can he rightly be sued in an interdict, nevertheless, he will not be able to usucapt, seeing that the deceased could not. The rule is the same if it is a question of long possession; for he will not be rightly defended, since the fact of his good faith does not cover the start [of his possession].

12 PAUL, *Replies, book 16:* A creditor sold pledged property when he could be barred by prescription of long possession on the part of the possessor of the pledged property; the question is whether a defense against the purchaser will avail the

possessor. Paul replied that the said defense is also competent against the purchaser.

13 HERMOGENIAN, *Epitome of Law, book 6:* In all disputes with the imperial treasury a prescription of twenty years is observed, except for the cases where it has specifically been provided that lesser periods must be applied. 1. Accounts of the state which have been signed and canceled cannot after twenty years be revived against the person, who administered them, while against his heir they cannot be revived after ten years.

14 SCAEVOLA, *Questions Discussed Publicly, sole book:* With regard to accessions of possession we can lay down nothing in perpetuity, nor a general principle; for they exist in equity alone. 1. They clearly are allowed to persons who succeed to the position of others whether in terms of a contract or of a will; for the accession of a testator is allowed to his heirs and to those who are regarded as successors. 2. Therefore, if you have sold a slave to me, I may make use of your accession. 3. And if you have given me property in pledge and I pledged the same property to a third party, my creditor will make use of the accession of your period of possession against the third party as well as against you, as long as you have not paid the money to me; for he who is in a preferent position to me ought, much the more so, to succeed against you, seeing that I would have been preferred over you. But if you should have paid the money to me, I cannot in that case make use of your accession. 4. Likewise, if in your absence a person who was regarded as an unauthorized administrator for you sold me a slave and on your return you ratified it, I may make use of the accession. 5. Likewise, if you have given me property in pledge and it was agreed that if you have not paid the money, I was allowed to sell the pledged property in terms of the agreement, and I did so sell it, the accession of your period of possession will have to be allowed to the purchaser, even if the pledge has been sold against your will; for if you have not paid the money, you are then treated as having acquiesced in the sale at the time when you entered into the contract.

15 VENULEIUS, *Interdicts, book 5:* In usucapion the following rule is observed that even if the property was possessed for the least moment of time on the last day, the usucapion, nevertheless, is completed. And the whole day is not required in order to satisfy the specified period. 1. Accession of possession occurs not only of the period when the property was in possession of the person from whom you purchased it but also when it was in possession of the person who sold it to him from whom you purchased it. But if some intermediate person among the predecessors in title did not have possession, the possession of predecessors previous to him will not be of assistance, because it was not unbroken, just as the possession of a predecessor in title cannot be added to that of a person who does not possess. 2. Likewise, the period of possession of the person from whom you bought, or of the one from whom the person you have instructed to buy bought, and the period in the hands of him who commissioned the sale must be added. But if also he who has been given the mandate has commissioned another person to sell, Labeo says accession must be allowed of the possession of the person who subsequently gave the mandate only if the owner had permitted him to do that very act. 3. However, even if I shall have purchased property from a son-in-power or from a slave, accession of the period when it was in the possession of the father or of the master must be allowed to me only if he sold the property either with the consent of the father or of master or when he had administration of the *peculium.* 4. Likewise, accession is allowed with the period it was in the possession of a *pupillus* from whose tutor you purchased it when he was exercising tutorship of the *pupillus.* The same rule must be followed in the case of a person who purchased from the curator of a *pupillus* or of a lunatic; and if on behalf of a child in the womb or of a woman who was in possession in order to protect the property, a reduction occurred in respect of the dowry; for that period too is added. 5. However, these accessions must not be interpreted in as wide a sense as their words allow, as though even if an article was in the possession of a seller after sale and delivery of the property transferred, that period would benefit the purchaser; however, only that period which occurred before would be to his benefit, even though the seller did not possess that property at the time of the sale. 6. To a person to whom an heir sold property belonging to his inheritance, both the period of possession of the heir and of the deceased ought to be added.

16 PAUL, *Sabinus, book 3:* Accession cannot be of benefit to us without a period of possession on our own part.

4

THE DEFENSE OF FRAUD AND THAT OF DURESS

1 PAUL, *Edict, book 71:* In order that this defense can be more clearly understood, let us first examine the reason why it has been established, and, then, in what manner fraud is committed, and by that we shall understand when the defense avails; thereafter, the persons against whom it has application. And, lastly, we shall investigate the periods within which the defense is competent. 1. The praetor established this defense to the end that a person's fraud should not benefit him through the medium of the civil law but contrary to natural equity. 2. However, whether an act has been done with fraud is gathered from the act. 3. And, indeed, fraud is committed as much in respect of contracts, as in respect of wills and laws.

2 ULPIAN, *Edict, book 76:* It is, moreover, plain that this defense was established for the same reason as that for which the action for fraud was established. 1. It follows that we should examine the cases in which the defense has application, and the persons against whom it may be raised. And, indeed, it must be noted that it is required specifically to state the person of whose fraud someone is complaining, thus not *in rem* "if in that matter nothing was done by fraud," but thus "if in that matter nothing was done by the fraud of the plaintiff." The person who raises the defense, therefore, ought to specify the act of fraud on the part of the plaintiff, and it will not be sufficient for him to show that there was fraud in the transaction; or if he alleges an act of fraud by another, he will have to enumerate their names specifically, provided they are the persons whose fraud prejudice him. 2. Clearly, the defense is pleaded *in rem* as regards the person who raises the defense; for the question is not against whom fraud was committed, but whether in that matter an act was done with fraud on the part of the plaintiff. 3. With regard to the first point, as to the cases in which this defense has application, the following are the matters which can be discussed. If someone without good cause stipulated something from another and then sues him in terms of that stipulation, the defense of fraud will surely bar him; for even though he has committed no fraud at the time that he stipulated, nevertheless, it must be said that he was acting fraudulently at the time of joinder of issue, if he perseveres in claiming in terms of that stipulation, and also if he had a good cause when the stipulation was made, but seems to have no proper cause now. Consequently, even if a person intending to give a loan stipulated for the money and then did not give the loan, then, although there was a definite cause for the stipulation but it has either not eventuated or been completed, it will have to be said that the defense will avail. 4. The question also arises whether the defense of fraud avails if someone has unconditionally stipulated for a definite sum because this was so arranged, but after the stipulation was completed he entered into a pact that the money is not to be claimed for the time being until a specified day. And, indeed, there must be no doubt that the defense of agreed pact can in any event be brought, but also if he wishes to make use of the present defense, nonetheless, he will be able to do so; for it cannot be denied that one who claims contrary to what was agreed is acting with fraud. 5. And generally it must be known that in the case of all defenses *in factum* the defense of fraud arises, because whosoever claims that which can be defeated by any defense whatsoever is acting with fraud; for even if nothing was done with fraud at the start, nevertheless, by claiming now he is acting fraudulently, unless there was such ignorance on his part that he may be free of fraud. 6. It has rightly been asked whether, if a creditor has accepted interest for a future period and nonetheless claims the capital sum afterward before the period for which he had received interest passes by, he may be barred by the exception of fraud. And it can be said that he is acting fraudulently; for by accepting the interest he appears to have deferred his claim until the time which comes after the date of the interest paid and to have tacitly agreed that he will not be claiming in the interval. 7. Likewise, it is asked: If someone bought a slave freed conditionally (*statuliber*) who has been ordered to pay ten, and, being ignorant, stipulated for double, and then accepted the ten, he, on the slave's freedom being asserted, can sue on the stipulation for double, but, unless he subtracted the ten which he accepted in fulfillment of the condition,

he must be defeated by the defense; and Julian too has written to this effect. If, however, the person freed conditionally has paid the money out of the property of the purchaser or out of the *peculium* which belonged to the purchaser, it can be said that the defense does not avail; for he did not act fraudulently.

3 PAUL, *Edict, book 71:* Likewise, if, on the ground that, before ownership is transferred to me, he gave ten to the seller, I bring an action on sale to receive the ten, I consider that the action is competent to me, if I was prepared to set him free in terms of the stipulation for double.

4 ULPIAN, *Edict, book 76:* Celsus was asked whether, if when creditors of an inheritance had mandated Titius to accept the inheritance, and one of them, in order to deceive him had not given a mandate but had been planning to give a different mandate if he [Titius] would not accept, and then he sued, he may be barred by a defense; and Celsus said that he ought to be barred by the defense of fraud. 1. Julian wrote: If someone, when he was ill, had promised one hundred aurei to a cousin of his wife, wanting, in fact, that money to come to his wife, and afterward he recovered, can he make use of the defense if he is sued? And he reports that Labeo had decided that he can make use of the defense. 2. If we have agreed to go to an arbitrator, and afterward when I did not stand by it on the ground of adverse health, the penalty was forfeited, can I make use of the defense of fraud? And Pomponius said that a defense of fraud will benefit me. 3. Where you have agreed to go to arbitration with one from whom six hundred is owed to you and afterward you by inadvertence stipulated for a penalty of one hundred, my opinion was asked. Labeo considers that it is in keeping with the duty of the arbitrator to order that so much be paid to you as was due in actual fact, and if this is not done, not to forbid that anything more be paid; but Labeo says that even if that was omitted, the amount that was owed can be claimed, and if the penalty were perchance claimed, the defense of fraud will avail. 4. If someone without the authority of the tutor paid a *pupillus* what he owed him and in consequence of that payment the pupil was enriched, it is very rightly stated that a defense will avail against those who claim. For also if he received money on a loan or if he was enriched through some other contract, it is said that the defense must be allowed. The same will also have to be said in other cases in which a lawful payment is not made; for if they have been enriched, the defense will be of application. 5. Labeo also writes that if someone purchased a slave knowing him to be a runaway and he obtained a stipulation that he was not a runaway slave, and afterward he sued on the stipulation, he ought not to be barred by the defense, since this was agreed (although he would not have an action on sale); but if it had not been agreed, he will be defeated by the defense. 6. But if someone to whom money is owing arranges with the debtor and sells the debt to Seius whom the debtor had instructed to purchase the debt, and the purchaser entered into a stipulation with respect to the transaction, and afterward the creditor retains the money which he has recovered through a judgment, can the purchaser sue on the stipulation? And Ofilius considers that if the seller of the debt was not prepared to return the amount he had received from the purchaser, the exception of fraud will not avail against the latter; and I think that the opinion of Ofilius is correct. 7. Labeo said: If in a claim for a slave judgment was given in favor of the plaintiff and by order of the judge a guarantee was given that the slave shall be delivered within a fixed period, and a penalty was stipulated, if the slave should not have been delivered, the plaintiff who then both claims the slave by *vindicatio* and claims the penalty, ought to be defeated by the defense; for it is inequitable to have possession of the slave as well as to demand a penalty. 8. An opinion is also asked: If I have given you pearls in pledge and it was agreed that they be returned on payment of the money, and these pearls were lost through your fault and you claim the money. There exists an opinion of Nerva and Atilicinus who state that the following defense must be pleaded: "if it has not been agreed between me and you that the pearls be returned on payment of the money"; but it is more correct that the defense of fraud ought to avail. 9. If a *minor* donated an infant slave to me and thereupon claims it by *vindicatio*, he ought to be defeated by the defense of fraud, unless he repays the cost of maintenance and any other reasonable expenses that may have been incurred on it. 10. Furthermore, it must be noted that if contrary to the wish of the testator someone claims anything under a will, he usually is defeated by the defense of fraud; and consequently, an heir who does not have the testator's consent is defeated by the defense of fraud. 11. If someone was appointed heir to a twelfth portion in terms of which he could recover two hundred, and afterward preferred a legacy in which one hundred was com-

prised on the ground that he should not become involved with the troubles of the inheritance, is he to be barred by the defense of fraud if he claims the legacy? And Julian said that he ought not to be barred. But if he should have received a fee, or something which could be regarded as a fee, from a substitute, in order not to accept the inheritance, he said that if he then claims the legacy, he will be considered to be acting fraudulently and will for that reason be defeated by the defense of fraud. 12. The question was asked whether, if when I had the usufruct of land, you sold that land to me at my wish, ought the defense to be pleaded against me if I claim the usufruct. And we follow the rule that the defense of fraud avails. 13. Marcellus says that a replication of fraud is not allowed against a defense of fraud. Labeo is also of the same opinion; for he says that it is inequitable that mutual wickedness, in fact, should serve as a reward to the plaintiff, but serve as a penalty against him who is being sued, since it is far more equitable that the plaintiff recover nothing from an act which was performed with perfidy. 14. It is provided both by constitutions and by the opinions of authors that there ought to be no doubt that a replication of fraud must also be allowed against a defense of the *senatus consultum Macedonianum* and that it ought to prevail. 15. Labeo says that if an action on stipulation is competent because of a clause of fraud, the defense of fraud must nonetheless avail, if anything was done contrary to it; for before a breach of the stipulation occurs, the claimant could have done nothing fraudulently and then do so when he is claiming; and on that ground the defense is necessary. 16. Neither the defense of fraud nor any other defense, indeed, which affronts the standing of a patron or a parent contrary to good morals, can be available against the parents or the patrons; however, a defense on the facts will have to be pleaded, so that if, for instance, it is alleged that money has not been paid, the defense of money not paid may be raised. Moreover, it is immaterial whether the patron sues on his own contract or, indeed, on that of another; for respect must always be shown to him during his lifetime as well as after his death. If, however, a patron sues the heir of a freedman, I am of the opinion that the heir of the freedman can bring a defense on the ground of the patron's fraud but that the freedman shall not raise the fraud of the patron, even if sued by the patron's heir; for it is agreed that respect be shown by the freedman to the patron during the latter's lifetime as well as after his death. In a stipulation a fraud clause will clearly not have to be removed; for an action of fraud is brought not on the fraud clause, but on the stipulation. 17. In this defense we can plead both the fraud of a slave or of another person subject to our power, and the fraud of those by whom property is acquired. Moreover, the defense must be pleaded without limit of time of the fraud of slave and sons-in-power, if, indeed, an action is brought on a transaction by them in connection with their *peculium*; if, however, it is not in connection with the *peculium*, then the defense ought to be pleaded only in respect of what was committed in connection with the very transaction which was performed, and not also if some fraud supervened afterward; for it is not just that the fraud of the slave should harm his master beyond the transaction in which he used his services. 18. It has been asked whether a defense can be pleaded in respect of the fraud of a procurator who was only appointed to bring an action. And I am of the opinion that it can rightly be pleaded, even in respect of his past fraud, if the procurator was appointed in his own interest. That is to say, if he committed an act of fraud before the suit was brought, the defense must be pleaded, but if he was not appointed in his own interest, only present fraud must be introduced into the defense. But if it is a procurator to whom the administration of all one's affairs was entrusted, then, Neratius writes, the exception can be pleaded in respect of every fraud of his. 19. I instructed Titius to enter into a stipulation with you, and thereafter Titius instructed Seius, and Seius entered into a stipulation with you and instituted action; Labeo says that the exception must be pleaded both in respect of my fraud and that of Seius. 20. It was also asked whether, if any debtor has cheated you and made you indebted to me and I entered into a stipulation with you, and then sued you, the defense of fraud avails. And the better view is that you are not permitted to plead the fraud of my debtor as a defense against me, seeing that I have not cheated you; you, however, will be able to take action against my debtor himself. 21. But if a woman after committing a fraud assigned her debtor to her husband for her dowry, the same view will have to be approved, namely, that it ought not to be permitted to plead the fraud of the woman as a defense, lest she become undowered. 22. Julian was asked whether, if the heir of a father-in-law from whom a dowry was being claimed pleaded as a defense the fraud of the husband and the wife by whom the money was obtained, the defense derived from the person of the wife will avail.

And Julian said that if the husband claims from the heir of the father-in-law on the promise of the dowry and the heir pleads as a defense the fraud of the daughter who had acquired the money, the defense avails; for the dowry which the husband claims from the heir of the father-in-law is, he says, regarded as acquired for the daughter, seeing that she will obtain the dowry through it. Julian does not explain whether the fraud of the husband too can be pleaded as a defense; however, I consider that it was his opinion that a defense of the fraud on the part of the husband also avails, even if, as he says, no dowry is regarded as acquired for the daughter. 23. The question was also discussed among several as to whether a defense of fraud on the part of a tutor ought to avail against his *pupillus* if the latter sues. And I consider that it nonetheless must be said to be the more beneficial rule that even if *pupilli* are to be benefited through such persons, the defense must avail against the *pupillus*, whether someone has purchased the property of the *pupillus* from his tutor or whether a contract was made with him with respect to the property of the *pupillus* or whether the tutor did something fraudulently and the *pupillus* was enriched thereby; and a distinction must not be made as to whether or not a guarantee was given to him or whether or not the tutor was solvent, as long as he was administering the property; for how is the person who contracts with the tutor to guess this? If you put to me that someone has colluded with the tutor, his act will clearly prejudice him [the *pupillus*]. 24. If someone is administering affairs not as a tutor, but on behalf of the tutor, let us see whether his fraud avails against the *pupillus*. And I would think that it does not avail; for if he who administered affairs on behalf of the tutor sold property and it was usucapted, the defense does not avail against the *pupillus* if he claims his property, even if a guarantee has been given to him, because the administration of the affairs of the *pupillus* has not been entrusted to him. 24a. In accordance with the above, I lean more to the opinion that a defense of fraud on the part of the tutor must be pleaded against the *pupillus*. 25. What we have said of the tutor, that will have to be said of a curator of a lunatic too, as also of a curator of a prodigal or of a *minor* under twenty-five years of age. 26. Moreover, the defense will surely have application in the case of fraud on the part of a *minor* under twenty-five years of age himself; for there ought to be no doubt at all that sometimes the defense applies even in respect of fraud on the part of a *pupillus* if he be of an age where he is not free of wrongful intent. Moreover, Julian also has written on many occasions that *pupilli* who are close to puberty are capable of wrongful intent. And what is the position if on delegation by a *pupillus* a debtor has paid money to his creditor? He said that he must be assumed to be of the age of puberty lest he recover the same money twice because of ignorance [on the part of the debtor] of his wrongful intent. The same, he said, must apply in the case of lunatic, if, when he was regarded as of mental capacity, he ordered his debtor to pay his creditor or if he has in his home that which was claimed. 27. The defense of fraud on the part of his predecessor in title is not given against a purchaser. However, if one makes use of accession by one's predecessor, then it seemed most equitable that he who makes use of accession through the person of his predecessor suffers for the fraud of his predecessor, as it is equally held that a defense attaching to property, indeed, avails against the purchaser too, but one which arises from a wrong on the part of one person, ought not to avail against another. 28. If, when the legal succession to the inheritance of Gaius Seius would have come to you, I was instituted as heir, you fraudulently persuaded me not to accept the inheritance, and thereupon I repudiated the inheritance, but you ceded it to Sempronius in return for a price and he claims the inheritance from me; he cannot be subject to a defense based on the fraud of the person who ceded it to him. 29. However, if someone brings a *vindicatio* by virtue of a legacy, or a person to whom property has been granted by way of donation brings a *vindicatio*, is he subject to a defense for fraud on the part of the person to whose position he has succeeded? And Pomponius thinks that the better view is that he must be barred; I too consider that they must be defeated by the defense, since they have benefited from a lucrative cause; for it is one thing to purchase, another to succeed by way of such causes. 30. The same Pomponius treats of a person who has received property in pledge who sues in a Servian or hypothecary action; for Pomponius thinks that such a person too must be barred; for the property will revert to the person who acted fraudulently. 31. Moreover, the fraud of his predecessor in title is, as we have stated, not pleaded against a purchaser. But we shall

apply this solely to the case of a purchaser; similarly, in the case of one who has bartered property or accepted it in payment; likewise, in similar cases of persons who resemble the position of purchasers. But if someone has been noxally delivered, Pomponius thinks that he will be subject to the defense to which the person who delivered him noxally would have been subject. Consequently, if someone appears to have acquired property from any other cause whatsoever which involves a virtually lucrative acquisition, he will be subject to a defense based on the fraud of the person to whose position he has succeeded; for it is sufficient that he, who paid a price or something in lieu of a price, should not, if he is a purchaser in good faith, be subject to a defense based on the fraud of his predecessor in title, and certainly not if the former is himself free of fraud. But if he himself is not free of fraud, he will be subjected to the defense of fraud and suffer a defense for his own fraud. 32. If you have bought land, which belonged to Sempronius, from Titius, and the land has been delivered to you and the price paid, and then Titius became heir to Sempronius and sold and delivered the said land to Maevius, Julian said that it would be equitable that the praetor should protect you, because, if Titius himself had claimed the land from you, he would also be barred by a defense devised *in factum* or by a defense of fraud, and if you yourself were in possession of the land and had brought a Publician action, you would use a replication against one who pleaded the defense that "it was not your property," and thereby it was accepted that he had sold land of which he did not have bonitary ownership. 33. Cassius had not proposed a defense of duress as he was content with the defense of fraud which was a general defense; but it has appeared to be more useful to plead the defense of duress too. For, indeed, it was in some respect different from the defense of fraud, inasmuch as the defense of fraud covered the person who committed the fraud, whereas the defense of duress was designed *in rem*, namely, "if in that matter nothing has been done by duress," so that we do not inquire whether he who brings the action did anything by duress but whether duress had been committed in the matter by anyone whomsoever, and not only by the person who brings the action. And although a defense based on the fraud of a predecessor in title may not be pleaded, nonetheless, we follow the rule that a defense can be raised based on duress not only by the predecessor in title but on duress exercised by any person whatsoever. 34. It must be observed that this defense of fraud ought to be raised by a person who has not suffered duress at the hands of a parent in whose power he was; for the parent is permitted to cause prejudice to children in matters relating to the *peculium*. But if he has withdrawn from the paternal inheritance, he will have to be assisted, as he is assisted in other situations.

5 PAUL, *Edict, book 71:* You owe me ten unconditionally; I then bequeathed that to you subject to a condition. If in the interval the heir were to claim the amount, he ought not to be barred by the defense of fraud, since the condition can even fail; he, therefore, will have to interpose a stipulation for the legacy; but if the heir does not give this guarantee, he will be barred by the defense of fraud; for it is to the advantage of the legatee to retain the amount rather than that the hereditary estate be subjected to *missio in possessionem*. 1. If a right of passage has been bequeathed to someone and, while the *lex Falcidia* is of application, he were to claim the whole legacy without offering the value of a fourth part, Marcellus stated that he is barred by the defense of fraud, since the heir is looking after his own interest. 2. If I have donated property to someone but have not delivered it, and the person to whom I made the gift with my knowledge built on the said property before delivery of possession, and, while he was building, I obtained the possession and he were to claim the donated property from me, and I were to plead a defense that [the gift] made was in excess of the legal limit, ought a replication of fraud to be available? For by allowing him to build and not making good his expenses, I have acted fraudulently. 3. Even the subsequent fraud of an agent who has been appointed to claim money avails against the principal. 4. If a slave has been sold by someone whom the owner permitted to do so and the slave was returned to the owner, a defense of rescission is pleaded against the seller if he sues for the price, even though the person who sold has already paid the price to the owner (and he who has already paid money to the owner is also barred by the defense that the property has not been delivered), and consequently, the person who sold brings an action

against the owner. Pedius stated that the position of one who made the sale when acting as unauthorized administrator for us, is the same. 5. If I substituted someone, who wished to make a gift to me in excess of the legal limit, as debtor to my creditor, he will not be able to use a defense against the creditor if he sues, since he is claiming what is his. A husband is in the same position; nor ought one who is suing in his own right to be barred by the defense. Ought a defense for fraud on the part of a woman, therefore, really to be pleaded against her husband if he claims a dowry when he had not proceeded to marry her, except in the case where he had received the dowry? Or except where he has already divorced her? Consequently, the debtor who has substituted another or the woman is liable to a *condictio* either to free the debtor, or that the money be returned to him if he has paid. 6. Although an action for fraud is extinguished within a fixed period, the defense need not also be pleaded within the said period; for the latter is permanently competent, since a plaintiff, indeed, has it within his power as to when he will make use of his right, while he against whom an action is brought has not it within his power as to when he may be sued.

6 GAIUS, *Provincial Edict, book 30:* If through the act of a creditor it happened that his debtor lost the money which he would have paid, the creditor will be defeated by the defense of fraud. The position is also the same if the creditor does not ratify that the money has been paid to his own creditor.

7 ULPIAN, *Edict, book 76:* Julian stated: "If on your instruction I promised money, which I thought I owed you, to someone to whom you wished to make a gift, I shall be able to protect myself with the defense of fraud, and, in addition, a *condictio* is available to me against the stipulator that he release me." 1. The same Julian stated that if on your instruction I promised to someone, whom you thought to be your creditor, money which I thought I owed to you, the person suing me ought to be barred by the defense of fraud, and, moreover, by suing the stipulator I may claim from him that he give a discharge of the stipulation. And this view of Julian contains humanity so that I may use the defense as well as a *condictio* against him to whom I became liable.

8 PAUL, *Plautius, book 6:* A person who claims what he will have to return acts fraudulently. 1. Thus, if an heir has been condemned not to claim from a debtor, the debtor can employ the defense of fraud, as well as bring an action based on the will.

9 PAUL, *Edict, book 32:* If a procurator in a case has in return for money allowed himself to be condemned and an action on the judgment is brought against the principal, the latter will protect himself with the defense of fraud. And that which the procurator has received cannot be taken back from him; for it is more just that money which has been received on immoral grounds remain with the person who has been deceived than with him who deceived.

10 MARCIAN, *Rules, book 3:* When a husband or his wife built something in a courtyard donated to him or her [by the other], it is the opinion of most that the property can be retained by pleading the defense of fraud.

11 NERATIUS, *Parchments, book 4:* If a procurator brings an action, a defense based on his fraud ought not to be allowed, because it is the suit of another person and he [the procurator] is foreign to that matter, and the fraud of one person ought not to harm another. If he [the procurator] acted with some fraud after joinder of issue, it can be questioned whether a defense in respect of it ought to be pleaded in the trial, because on joinder of issue the suit becomes that of the procurator, and he is pursuing it to some extent on his own behalf. It is accepted that a defense based on the procurator's fraud ought to be allowed. The same must be said with respect to a tutor who brings an action on behalf of his *pupillus*. 1. In general, however, a rule ought to be followed in such a matter that fraud should in all cases be penalized, if it will cause harm, not to another, but to the very person who perpetrated it.

12 PAPINIAN, *Questions, book 3:* A person who can impede an action by the equity of a defense is protected by the defense of fraud.

13 PAUL, *Questions, book 14:* When children who in the opinion of their father deserved nothing have been disinherited, their right ought to be protected by rescission of the will, and a defense of fraud will not be raised. This ought to obtain not only with respect to themselves but also with respect to their children who are heirs.

14 PAUL, *Replies, book 3:* Paul gave an opinion that one who constructed a building on the land of another can recover the costs, that is to say, by pleading the defense of fraud, only if he was in possession and the owner of the land claims the property from him.

15 SCAEVOLA, *Replies, book 5:* A surety who was condemned on the ground of eviction was prepared to make good the land which has been evicted and everything covered by the contract of sale; my question is whether on the ground of the judgment he can now bar the purchaser if the latter brings an action. The reply was that the defense, indeed, can be pleaded but that the judge will assess that the purchaser be indemnified for his losses.

16 HERMOGENIAN, *Epitome of Law, book 6:* If a debtor who has been delegated by a lunatic, whom he thought to be of sound mind, pays his creditor, and then an action is brought against him, he is protected by a defense of fraud in respect of the advantage which accrued to the estate of the lunatic.

17 SCAEVOLA, *Digest, book 27:* A father had promised a dowry for his daughter and had agreed to support his daughter and all her [children]; the said man, a peasant, wrote to his son-in-law concerning past interest accrued on the promise of dowry; since the former has supported his daughter and her husband has incurred no expenses, it was asked whether the defense ought to avail against the son-in-law if he brings an action on stipulation on the chirograph. The reply was that if, as previously stated, the father, since he provided support, had made his promise in error, the defense of fraud will be of application. 1. A grandfather bequeathed to each of his grandchildren from his daughter a hundred, and he added the following words: "Forgive me, for I could have left more to you, were it not that your father Fronto to whom I had given fifteen in loan which I have not been able to recover from him had treated me badly; subsequently, there came the enemy which deprived me of nearly all my estate." It was asked whether, if the heir of the grandfather were to claim fifteen from these grandchildren as heirs of their own father, he should be regarded as acting contrary to the wishes of the deceased and should be barred by the defense of fraud. The reply was that the defense will be available. 2. An heir appointed to a quarter of an estate purchased the share of a co-heir who had been appointed to three quarters of the estate for a specified price of which he promised in a stipulation to pay a certain amount from debts in his account book; when the seller died, Septicius started a prosecution for forgery of the will and claimed the inheritance from the purchaser and demanded that he should not reduce the estate in any way; the question arose whether, while the trial on the forgery was pending, the heirs should be barred by a defense of fraud if they claimed on the stipulation. The reply was that the heirs of the seller can be barred by the defense of fraud if they proceeded with their claim before the outcome of the trial. 3. A woman, having instituted her husband and a son, common to both of them, as heirs to a half share, instituted her daughter from a previous marriage heir on the following terms: "Let my daughter Maevia be my heir to six twelfths of the estate, provided that until the date of my death you in return for my share treat as settled the account concerning a transaction which is pending from your tutelage which my father Titius, who is your grandfather, has been administering." The question arose whether, if the daughter, seeing that she had been instituted subject to a condition, failed to accept the inheritance in order to retain her action on tutelage intact, can recover the legacies bequeathed to her by her mother. The reply was that in accordance with the facts put forward, she about whom the question is being asked claims contrary to the terms of the will and, consequently, the defense of fraud will bar her.

5

IN WHICH CASES AN ACTION IS NOT GIVEN

1 ULPIAN, *Edict, book 76:* An oath not undeservedly occupies the role of *res judicata,* since the person himself made his adversary judge of his own cause when he tendered an oath to him. 1. If a *pupillus* has tendered an oath without the authority of his tutor, we shall say that the defense [of an oath] is not available, unless the tender was made on authority of the tutor at the trial. 2. If the claimant of land tendered an oath to his adversary that he would withdraw from the dispute if the author of the latter's title has sworn that he had delivered the land as his own, the defense will be allowed to the possessor of the land. 3. If a surety has taken an oath, if he has taken the oath solely with respect to his own position to the effect that he himself was not liable, it will not be operate in favor of the principal debtor; however, if he has sworn with respect to the property (*in rem*), the defense will be allowed to the principal debtor too. 4. If I have manumitted a slave who had administered my affairs while he was a slave and thereafter I stipulated from him that, because he was administering my affairs, whatever he would be owing me in that connection if he had then been free, that shall be paid, and if I subsequently were to sue on the stipulation, I am not barred by a defense; for a freedman cannot complain that he has been harmed on that account, if he does not make a profit derived from the affairs of his patron. 5 Whatever I have stipulated with the effect of encumbering liberty, that I cannot demand from a freedman. Moreover, acts with the effect of encumbering liberty have been very splendidly defined in the following way, namely, as duties which are imposed in such a manner that if the freedman should offend his patron, they can be demanded from the freedman and that he is always subject to the fear of such a demand, and that because of such duress he is liable for something at the behest of his patron. 6. In sum, if something has been imposed on a freedman as immediate part of a contract which encumbers his impending liberty, it must be said that it gives rise to a defense. But if it has been imposed after expiry of an interval, the position, indeed, is doubtful, because no one has compelled him to make such a promise; yet even in such a case, if, after the case has been heard, it were clearly to appear that the freedman has subjected himself in this way solely through fear or through excessive reverence for his patron, it will have to be accepted that he has subjected himself to a kind of penal stipulation. 7. If, for the sake of his freedom, a freedman entered into a partnership with his patron and the patron were to bring an action of partnership against the freedman, is this defense required? And I am of the opinion that the freedman is *ipso jure* protected against the demand of his patron. 8. It must be observed that a defense based on encumbrance of liberty, like any other defenses, ought not to be refused to a surety, nor, indeed, to one who has become a debtor at the request of a freedman; but it ought to be refused to the freedman himself, if he has been appointed procurator to defend the case by the debtor, or if he has become heir to him [the debtor]. For since it was the purpose of the praetor to aid a defendant in obligations of this kind, his purpose will not be fulfilled if he did not protect the surety, as well as the person who became debtor at the request of the freedman against the patron; for it makes little difference whether the freedman was required to pay the patron directly or whether through the intermediate agency of the surety or the debtor. 9. However, whether the promise was made to the patron himself or to another at the wish of the patron, it is regarded as having been made in order to encumber liberty, and, consequently, this defense will be of application. 10. But if a patron has substituted his freedman as debtor to his creditor, let us see whether he [the freedman] can employ the defense against the creditor to whom as delegated debtor he has promised with the effect of encumbering his liberty. And Cassius reports that Urseius was of the opinion that the creditor, indeed, ought not to be barred by the defense, seeing that he recovered what was due to him, but that the freedman can bring a *condictio* against the patron, if the latter had acted thus in order not to settle the dispute. 11. Again, if a freedman has in his place delegated someone as debtor to his patron, the patron is not barred by any defense, but the freedman can reclaim from his patron by means of a *condictio.* 12. This defense must be granted not only to the freedman him-

self but also to the freedman's successors; and it must be observed that conversely the heir of a patron must be barred if he proceeds with the action.

2 PAUL, *Edict, book 71:* If a son-in-power has been tendered an oath and he swore that his father was not liable to pay, the father must be allowed the defense. 1. When, while gambling, I sold property in order to gamble and I am sued after having been evicted from the property, the purchaser will be barred by a defense. 2. If a slave promises money to his master in order to be manumitted, since the master otherwise would not have manumitted him, and when he became free he promises that money, it is said that the defense will not bar the patron if he claims that money; for this money has not been promised for the purpose of encumbering liberty. Otherwise, it would be unfair that the master should forfeit both the slave and his money. Consequently, money is considered to be promised with the effect of encumbering liberty, whenever a master has of his own accord manumitted someone and wants this freedman to promise money with a view, not to claim the money, but that the freedman should fear and obey him.

6

PROPERTY SUBJECT TO LITIGATION

1 ULPIAN, *Edict, book 76:* A notice given to prevent a sale does not cause the property to be subject to litigation. 1. If joinder of issue has occurred between Primus and Secundus and I bought the property from Tertius who had no part in the dispute, let us see whether there is room for the defense. And I would think that relief ought to be given to me because the person who sold the property to me had no part in the suit, and because it can happen that two persons engage in a suit with each other to the prejudice of one with whom they could not litigate. If, however, a suit has been joined with a procurator, tutor, or curator of someone, the effect will be to hold that he will be subject to the defense as if the litigation was with himself.

2 ULPIAN, *Fideicommissa, book 6:* If a slave knows what he bought while his master did not know, or conversely, it must be considered whose knowledge must be regarded as having priority. And the better view is that the knowledge of the person who purchased, and not of the person for whom the property is acquired, must be considered, and, consequently, the penalty of litigious property applies, provided, however, he purchased without the instructions of his master; for if the slave acted on instructions, his knowledge does not affect the issue, even if he knew; and thus Julian too writes with respect to property subject to litigation.

3 GAIUS, *XII Tables, book 6:* We are prohibited from dedicating property about which there is a suit as sacred property; if we act to the contrary, we suffer a penalty of double, and rightly so, lest by such conduct we be allowed to make the position of our adversary harder. But nothing is stated as to whether the double penalty ought to be paid to the imperial treasury or to the adversary; perhaps, however, it should preferably be paid to the adversary so that he may, so to speak, derive solace from the fact that he has been treated as the more powerful adversary.

7

OBLIGATIONS AND ACTIONS

1 GAIUS, *Golden Words, book 2:* Obligations arise either from contract or from wrongdoing or by some special right from various types of causes. 1. Contractual obligations are concluded either by delivery of a thing or by words or by consent. 2. An obligation by delivery [real obligation] is concluded by giving a loan for consumption. However, the giving of a loan for consumption (*mutuum*) operates in the case of things which are dealt with by weight, number or measure, such as wine, oil, corn, cash money, things which we hand over with the effect that they may become the property of the recipient, and so that we shall afterward receive back other things of the same kind and quality. 3. Also he to whom

we lend some article for use is bound to us by the delivery, but he is liable to return the very same article which he received. 4. And, indeed, he who received a loan for consumption (*mutuum*) nonetheless will remain bound, even if through some accident he lost what he had received, whereas he who received an article for use will be protected if through inevitable accident which human weakness cannot prevent he lost the property he had received. In other cases, however, he is obliged to observe the most exact diligence in guarding the property, and it is not sufficient for him to practice the diligence which he applies to his own affairs, if someone else could have guarded the property in a more diligent manner. But in the majority of cases, he is liable if negligence on his part occurs, for example, if, when proceeding abroad, he wished to take with him silver which he had received for the purpose that he shall be inviting friends to a dinner, and he lost it [the silver] either through a shipwreck or an attack by pirates or the enemy. 5. Also the person with whom we deposit some article is liable to us *re*; and he is himself liable for return of the article which he has received. But even if he lost the article in his custody through negligence, he is safe; for because he does not receive it for his own benefit, but for the benefit of the person from whom he receives it, he is liable only if anything has been damaged through wrongful intent on his part; indeed, he is not liable in respect of negligence for the reason that one who entrusts his property for safekeeping to a negligent friend, must blame himself. However, it is accepted that gross negligence falls under wrongful intent. 6. Also a creditor who received an article in pledge is liable *re*; and he is himself liable for return of the very article which he received. 7. An obligation is contracted by words through question and answer, when we stipulate that something should be given or done to us. 8. However, a person is bound either in his own name or for another; indeed, one who is bound on behalf of another is called a *fideiussor* (surety). And, in general, we accept from him whom we bind in his own behalf, other persons who are liable on the same obligation, whereby we ensure that the debt which we have introduced into an obligation is made safer for us. 9. If the thing which we stipulated to be given is of such a nature that it cannot be given, it is plain that the stipulation is on natural reason invalid, for example, if a stipulation with respect to a freeman or one already dead or a burned down building was made between persons who were unaware that the man was free or had died, or that the building had been burned down. The legal position is the same if someone has stipulated that a sacred or religious place be given. 10. A stipulation is no less invalid, if someone has stipulated for a thing of his own when unaware that it was his own property. 11. Again it is well known that a stipulation made subject to an impossible condition is invalid. 12. It is clear in the nature of things that a lunatic, whether he makes a stipulation or a promise, performs no valid act. 13. Very near to him in position is a person who is of an age that he does not yet understand what is being done; but in respect of him a more benevolent view has been accepted; for one who can speak is regarded as being able lawfully to stipulate as well as to promise. 14. It is clear in the nature of things that a dumb person has no part in a verbal obligation. 15. But the same is said of a deaf person too. Because, although he can speak, he must, if he promises, be able to hear the words of the stipulator, or if he stipulates, he must hear the words of the promisor. Hence, it is apparent that we are not speaking of one who is rather hard of hearing but of one who does not hear at all.

2 GAIUS, *Golden Words, book 3:* Obligations by consent occur in purchase and sale, letting and hiring, partnership and mandate. 1. Consequently, we say that an obligation by consent is contracted in those cases, because no special quality of words nor of writing is required, but it is sufficient that those who conduct the transaction agree. 2. Hence, such transactions are concluded even between absent persons, for instance, by letter or by messenger. 3. Again, in these contracts one person is bound to another with respect to that which one person is due to perform for another in accordance with what is fair and equitable.

3 PAUL, *Institutes, book 2:* The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do, or perform something for us. 1. Moreover, it is not enough for an obligation to be created that money belongs to the giver and becomes the property of the receiver, but also that it be given and accepted with the intent that an obligation be constituted. Therefore, if someone has given his money to me with intent to make a gift, then, even though it both belonged to the giver and became mine, I shall not be bound to him, because that is not what was transacted between us. 2. A verbal obligation also is constituted if that is performed between contracting parties; for if, say, in a joke or in order to demonstrate its nature, I have said to you, "do you promise," and you replied, "I promise," no obligation is created.

4 GAIUS, *Golden Words, book 3:* Obligations arise from delict, for example, theft, damage, robbery, and insult. They are all of one nature; for they consist in what is done, that is, the wrongdoing itself. On the other hand, contractual obligations exist not only by delivering of a thing but also by verbal form and by agreement.

5 GAIUS, *Golden Words, book 3:* If someone has administered the affairs of an absent person, then, indeed, if it was done in terms of a mandate, it is obvious that actions of mandate arise between them from the contract, and thereby they can sue each other for that which one of them is bound in good faith to perform for the other; but if the administration was without a mandate, it was clearly accepted indeed that they are bound to each other and that in respect thereof actions have been designed which we call actions for unauthorized administration, whereby equally they can sue each other for that which one of them is bound in good faith to perform for the other. However, the actions arise neither from contract, nor from delict; for he who has administered is not regarded to have contracted beforehand with the absent person, nor does it constitute any wrong for one to take on the administration of affairs without a mandate; much rather can he whose affairs have been administered be considered either to have contracted or to have done wrong without knowledge; but for purposes of equity it has been accepted that they are bound to each other. But this has been accepted in this way for the reason that generally persons proceed abroad with the intent that they will return immediately and on that account do not entrust the care of their affairs to anyone, and then through the intervention of changed circumstances they by necessity remain absent for a longer period; it was unjust that their affairs should suffer, and they would certainly suffer either if the person who offered himself to administer their affairs would have no action for what he has beneficially expended out of his own pocket, or if he whose affairs had been administered could by no right bring an action against the person who interfered in his affairs. 1. Also persons who are liable in an action on tutelage are not considered, properly speaking, to be bound by contract (for no contract is transacted between the tutor and the *pupillus*); but because they obviously are not liable in delict, they are regarded to be liable in quasi-contract. And in such a case, moreover, there are reciprocal actions; for not only has the *pupillus* an action against the tutor, but, conversely too, the tutor has an action against the *pupillus*, if either he incurred some expense on the affairs of the *pupillus* or became liable on his behalf or has pledged his own property to a creditor of the *pupillus*. 2. Also an heir who owes a legacy is considered to be bound neither in contract nor in delict; for the legatee is not considered to have made any contract either with the deceased or with the heir; moreover, it is more than plain that there is no wrongdoing in that connection. 3. Also he who received what is not due from one who pays it in

error, indeed, is bound as though a loan has been given, and he becomes available in the same action as that by which debtors are liable to creditors; but he who is liable on that ground cannot be considered to be liable on contract; for he who has paid in error seems to give with the intent to discharge an obligation rather than to contract one. 4. If a judge has made a cause his own, he does not, properly speaking, seem to be liable in delict, but because he was not bound in contract either, yet surely is considered to have done wrong in some way, albeit through imprudence, he is regarded as liable in quasi-delict. 5. Also a person from whose upper floor (whether it is his own or a hired place or even one in which he is living rent free) something has been thrown or poured down with the result that it caused harm to another is regarded as liable in quasi-delict; but because generally here he is liable for the fault of another, either of a slave or a child, he is not properly considered to be liable in delict. Similar to such a person is one who keeps something placed or suspended in a place, where it is general for the public to pass through, which can, if it fell down, cause harm to another. Consequently, if a son-in-power lived separately from his father, and something was thrown or poured down from his upper floor, or he kept something placed or suspended there, the falling of which is dangerous, Julian ruled that neither an action on the *peculium* nor a noxal action ought to be allowed against the father, but an action must be brought against the son himself. 6. Likewise, the man who runs a ship or an inn or a stable is regarded as being liable in quasi-delict for damage or theft which has been committed on the ship or in the inn or stable, provided that there was no wrongful act on his part but on the part of one of the persons through whose work he ran the ship or the inn or stable; for since this action has not been established against him on the basis of contract, yet because he used the services of bad men, he is in some degree guilty of fault, and, consequently, he is held to be liable in quasi-delict.

6 PAUL, *Sabinus, book 4:* In all temporary actions, the obligation does not terminate until the whole of the very last day is completed.

7 POMPONIUS, *Sabinus, book 15:* Actions cannot be given to a son against his father while the son is in the latter's power.

8 POMPONIUS, *Sabinus, book 16:* No obligation is created if it is subject to a condition "if I wish"; for that which you cannot be compelled to give unless you so wish is as if it has not been expressed. For neither is the heir of a promisor "who never wished to give" liable, because such a condition never comes into existence against the promisor himself.

9 PAUL, *Sabinus, book 9:* A son-in-power, as Julian thinks, has no action in his own name except the action for insult, the action against force or stealth, and the action on deposit or loan for use.

10 ULPIAN, *Sabinus, book 47:* Natural obligations are not judged solely on the basis that some action is competent on their [slaves'] behalf, but also on the ground that money which has been paid cannot be recovered.

11 PAUL, *Sabinus, book 12:* Since whatever we transact takes its source from our contract, our act is rendered void, if it does not derive the origin of the obligation from ourselves; and, consequently, we cannot stipulate or buy, sell, or contract in such a way that someone else may lawfully sue on it in his own name.

12 POMPONIUS, *Sabinus, book 29:* In an action on deposit, loan for use, mandate, tutelage, and of unauthorized administration, the heir is liable in full for the wrongful intent of the deceased.

13 ULPIAN, *Disputations, book 1:* Even sons-in-power can institute actions *in factum.*

14 ULPIAN, *Disputations, book 7:* Indeed, slaves are liable in delict, and remain liable, if they are manumitted; however, they are not civilly liable for their contracts, but are both bound and bind others naturally. Furthermore, if I pay a manumitted slave who gave me money on loan, I am released.

15 JULIAN, *Digest, book 4:* One who brought an action against an heir was defeated by the following defense: "if the instrument of the will was of such a nature that *bonorum possessio* can be granted against the will." If the emancipated son fails to claim *bonorum possessio*, it is not inequitable for a creditor to claim that the action against the appointed heir be set aside; for, as long as *bonorum possessio* against the will can be granted to a son, the heir is in some degree not a debtor.

16 JULIAN, *Digest, book 13:* A person who accepted money on loan from a slave belonging to an inheritance and who delivered land or a slave to him as a pledge and asked for a *precarium* possesses by *precarium*; for just as a slave belonging to an inheritance acquires ownership for the inheritance when receiving something by delivery, so by granting a *precarium* he ensures that the property cannot be usucapted. For also if he gave property belonging to the *peculium* on loan for use, or on deposit, he will acquire an action on loan for use and on deposit for the inheritance. This is the position if the contract has been transacted with respect to the *peculium*; for it is on this basis that the possession also must be regarded to have been acquired.

17 JULIAN, *Digest, book 33:* All debtors, who owe an article by lucrative cause, are released, if that article came to the creditors by lucrative cause.

18 JULIAN, *Digest, book 54:* If someone who had stipulated for Stichus to be given became heir to the person to whom the same Stichus was owed in terms of a will and then claimed Stichus under the will, he will not extinguish the stipulation; and, conversely, if he claimed Stichus in terms of the stipulation, he will retain his action under the will intact, because from the start these two obligations were constituted in such a way that if one of them is brought to suit, nonetheless, the other would remain intact.

19 JULIAN, *Digest, book 73:* An obligation arising from a promise of dowry is not regarded as a lucrative cause, but he who claims the dowry is in some way considered to be a creditor or a purchaser. Further, when the creditor or the purchaser begins to possess the property by lucrative cause, nonetheless, they retain their actions intact, just as, conversely, one who begins to possess an article by lucrative cause is not prevented from claiming the said property in terms of the lucrative cause.

20 ALFENUS, *Digest, book 2:* A slave does not usually in all cases obey the orders of his master with impunity, for instance, where the master had ordered his slave to kill a man or to commit theft against someone. Consequently, even though a slave had committed piracy on the orders of his master, an action must be brought against him after he is freed. And, therefore, whatever violent act he committed must afflict him with punishment, if the violence was not alien to a crime. But if some brawl arose from dispute and quarreling, or if some violence was committed in order to preserve a right, and no crime was constituted by these acts, then it does not behoove the praetor to allow an action against the slave when freed in respect of an act which the slave committed on the orders of his master.

21 JULIAN, *From Minicius, book 3:* Every person is considered to have concluded a contract in the place where he had bound himself to pay.

22 AFRICANUS, *Questions, book 3:* When someone, who had stipulated for payment to be made on a specified day, accepted a surety, the computation of the day must be based on the date when he accepted the surety.

23 AFRICANUS, *Questions, book 7:* In connection with a loan for a sea voyage, a penalty (as was usual) was introduced into the stipulation for the services of the person who would claim the money, if it was not repaid on the appointed date; the person who claimed the said money recovered part thereof and then ceased to claim, but subsequently, after passage of an interval, he instituted a demand. On being consulted, he [Julian] replied that the penalty can be claimed also in respect of the period during

which a claim was not made; what is more, this is so even if no demand had been made at all; the stipulation has not come into operation except when it was through the fault of the debtor that payment was not made; otherwise, it must be ruled that if the person who had commenced his demand ceased to continue when prevented by ill-health, the penalty was not incurred. However, it clearly can be questioned whether, if the person against whom the demand was made was himself in default, the penalty nonetheless is incurred, even though he tenders the money afterward; and it is said that the more correct view is that it is so. For also if an arbitrator in arbitration proceedings ordered money to be paid on a specified date and there was not failure to pay through the fault of the one who was ordered to pay, he gave as his opinion that the penalty was not incurred; so much so that Servius too considered it most correct that if the date on which payment was to be made was not included in the award of the arbitrator, a moderate period appears to have been allowed. This same ruling must be applied also when something has been sold on condition that unless the price shall have been paid on a certain date, the thing shall become unbought.

24 POMPONIUS, *Rules, sole book:* If I accepted money, as it were, on loan from a lunatic whom I considered to be of sound mind and the money was converted to my own use, a *condictio* is acquired by the lunatic; for in those cases where actions are acquired by us without our knowledge, in those same cases too, an action can be commenced on behalf of a lunatic, for example, when his slave makes a stipulation, or when theft is committed against him, or when by causing him damage the *lex Aquilia* is contravened, or if, when he was a creditor, a debtor happened to deliver property to another in order to defraud him. The position will be the same if a legacy is made to him or a *fideicommissum* is left to him. 1. Similarly, if he, who had given credit to the slave of another, became mad and thereupon the slave converted what he had received on loan to the use of his master, a *condictio* is acquired by the lunatic. 2. Likewise, if someone gave another's money in loan, who afterward ceased to be of sound mind, and the money was subsequently spent, a *condictio* is acquired by the lunatic. 3. And the unauthorized agent of a lunatic is liable to him in an action for unauthorized administration.

25 ULPIAN, *Rules, sole book:* There are two kinds of action, real, which is called *vindicatio*, and personal, which is called *condictio*. A real action is one by which we claim our property which is in the possession of another; and it is always brought against the person who is in possession of the property. A personal action is one which we bring against him who is bound to do some act or give something to us; and it always has application against that person. 1. Some actions, however, arise from a contract, others from an act, and some are *in factum*. An action arises from contract whenever someone contracts with another for his own benefit, for example, by buying and selling, by letting and hiring, and other like transactions. An action arises from an act whenever someone begins to be liable for some act which he himself has committed, for instance, he committed theft or an injury or caused damage. An action which is called *in factum*, is one such as, for example, the action which is given to a patron against his freedman by whom he was summoned to law in breach of the praetor's edict. 2. Moreover, all actions are described as either civil or praetorian.

26 ULPIAN, *Census, book 5:* After joinder of issue all penal actions transmit also to the heirs.

27 PAPINIAN, *Questions, book 27:* Obligations, which are not founded on their own sources, are confirmed neither by discretion of a judge nor by authority of the praetor nor by force of law.

28 PAPINIAN, *Definitions, book 1:* An action is given against a person, a claim against a thing: a lawsuit against the thing or against the person for the sake of obtaining the thing.

29 PAUL, *Replies, book 4:* When money was due to Lucius Titius in terms of a judgment and he lent other money to the same debtor, he did not in the instrument of loan of the money add that besides this money, money was due to him in terms of a judgment, I ask whether both claims remain intact for Lucius Titius. Paul replied that nothing has been advanced as to why they should not remain intact.

30 SCAEVOLA, *Replies, book 1:* A person who was made a slave is not regarded as returning to his obligations to creditors on the ground that he afterward recovered his liberty by grace of the emperor.

31 MARCIAN, *Fideicommissa, book 2:* Not only are stipulations which are dependent on an impossible condition of no validity, but other contracts too, such as sales, lettings, in which an impossible condition has been introduced are equally of no validity; for in a matter which involves the consent of two or more persons, the intent of everyone is looked at, and in a transaction of this sort their contemplation is without doubt of a kind that when adding a condition which they realize was impossible, they had in mind that nothing should be done.

32 HERMOGENIAN, *Epitome of Law, book 2:* When more than one action arises from one wrong, as happens when trees are alleged to have been furtively felled, it was after much disagreement established that all the actions are allowed.

33 PAUL, *Judgments, book 3:* In constitutions in which it is shown that the heirs are not liable to a penalty, it was accepted that if a person had been sued in his lifetime, then even recovery of the penalty is regarded as transmitting, as though joinder of issue occurred on his death.

34 PAUL, *Concurrent Actions, sole book:* A person who beats another's slave contumeliously by this one act falls foul of both the Aquilian action and the action for insult; for the *injuria* is done with intent, while the damage is done with fault, and, consequently, both actions are competent. However, if the one action has been elected, some say the other is extinguished. Others say that the action for insult is extinguished by the Aquilian action, since it ceases to be just and equitable that one who has paid the assessed amount be condemned; but if the action for insult has been brought first, he is liable under the *lex Aquilia.* But even such a judgment ought to be prevented by the praetor, except to the extent that the action is for the excess amount competent under the *lex Aquilia.* Therefore, it is more reasonable to accept the view that he is allowed to bring that action first which he prefers, but also to recover the excess inherent in the other action. 1. If a person to whom I lent an article for use, stole it, indeed, he will be liable to both an action on loan for use and for a *condictio,* but the one action extinguishes the other either *ipso jure* or through a defense, and this is the sounder opinion. 2. Hence, with respect to a tenant the answer has been given that if he has stolen anything from the land, he is liable both to a *condictio* and to an action for theft, and even to an action on letting; and, indeed, the penalty for theft is not merged, whereas the other actions merge into one another. And this is also said in respect of the Aquilian action, should I have lent you garments for use and you stole them; for both actions involve recovery of the thing. And, indeed, after the Aquilian action the action of loan for use will in all cases be ended; it is questioned whether after the action of loan for use the Aquilian action remains for the excess involved in the claim for the value within thirty days; but the sounder opinion is that it does remain, because it adds to the simple value, and after the simple value has been raised, it has no application.

35 PAUL, *Praetorian Edict, book 1:* Cassius said that in praetorian actions the following must be laid down, namely, that those which involve recovery of the thing, should be allowed even after a year, and the others only within a year. Moreover, praetorian actions which are not allowed after a year are not allowed against the heir, except, however, to recover his profit from him, as is done in an action for fraud and in an interdict for possession by force, and the like. Moreover, those actions by which we recover what is missing from our patrimony involve recovery of a thing, as when we bring an action against the *bonorum possessor* of our debtor, likewise a Publician action which is given on the model of the *vindicatio.* But when action is granted after usucapion has been set aside, it is terminated within a year, because it is granted contrary to civil law. 1. An action on a contract of town magistrates is allowed against the *duumviri* and the state even after a year.

36 ULPIAN, *Edict, book 2:* In *condictiones* ignominy ceases to be of application, even where they derive from cases involving *infamia.*

37 ULPIAN, *Praetorian Edict, book 4:* Under the word *action* is included a real action and a personal action, a direct action and an *actio utilis*, and a prejudgment, as Pomponius says; stipulations, if they are praetorian, are also included, because they produce the same effect as actions, as, for example, the stipulation for threatened harm, that for legacy and any similar ones. Interdicts too are included in the word *actio*. 1. Mixed actions are those in which both parties are plaintiffs, as, for instance, the action for regulating boundaries, the action for dividing an inheritance, the action for dividing common property, the interdict for the possession of land, and the interdict for possession of movables.

38 PAUL, *Edict, book 3:* We are bound not by the form of the written word but by the meaning which they express, since it has been accepted that there is no less validity in what is signified in writing than what is signified in words expressed with the tongue.

39 GAIUS, *Provincial Edict, book 3:* A son-in-power is bound in all matters just like the head of the household, and for that reason an action can be brought against him as though against a head of the household.

40 PAUL, *Edict, book 11:* Under the name of inheritance actions legacies are also counted even though they derive from the heir.

41 PAUL, *Edict, book 22:* Whenever a statute introduces an obligation, the ancient actions in that regard are available, unless it specifically provided that we should use a specified action only. 1. If two actions are competent on the same facts, the function of the judge thereafter is to see that the plaintiff shall obtain the greater amount of the remaining action, if the amount is the same or less, he shall recover just that.

42 ULPIAN, *Edict, book 21:* A person to whom a legacy has been left subject to a condition is not a creditor while the condition is pending, but at the time that the condition has been fulfilled, even though it is accepted that a person who has made a stipulation subject to condition, is a creditor even while the condition is pending. 1. We ought to regard as creditors those persons either who have some civil action, provided, however, that they are not defeated by a defense, or who have a praetorian action, or an action *in factum*.

43 PAUL, *Edict, book 72:* A head of the household who is independent, of the age of puberty, and of sound mind can incur obligations; a pupil is not in civil law bound without authority of his tutor, but a slave is not bound by his contracts.

44 PAUL, *Praetorian Edict, book 74:* There are practically four types of obligation: for obligations contain either a term of time or a condition or a restriction or an addition. 1. As for the term of time, there are two aspects; for the obligation either commences from a certain time or it is conferred up to a certain time. It begins from a certain time; for example, "do you promise to give on the first of March?" The effect of this is that it cannot be enforced before that date. But it extends up to a time in "do you promise to give until the first [of the month]?" However, it is accepted that an obligation until a certain date can be constituted no more than such a legacy can; for what starts as a debt to someone ceases to be a debt in definite ways only. Naturally, after the date the stipulation can be barred by a defense either of agreed pact, or of fraud. Thus, too, if a person in transferring property stated that he is transferring the land without its structures, it has not the effect of preventing the structures, which by nature adhere to the land, from passing with it. 2. A condition is effective if it is inserted when the obligation is contracted and not if it is added after it has been constituted; for example, "do you promise to give a hundred, if the ship has not arrived from Asia?" But in such a case there will be ground for a defense of agreed pact, or of fraud, if the condition should be fulfilled. 3. A restriction in an obligation occurs when we stipulate for ten or a slave; for performance of one of them destroys the entire obligation, and the one cannot be claimed, as long as both are definitely available. 4. Whereas an addition to an obligation can be either as to the person or as to the object. As to the person when I stipulate for myself or Titius. As to the object, when I stipulate for ten for myself or for a slave for Titius; and here the question arises

whether discharge from the obligation automatically occurs when the slave has been delivered to Titius. 5. If I have stipulated as follows: "Do you promise to give a hundred if you have not transferred the land?" Only the hundred is part of the stipulation, but the land serves for its discharge. 6. But if I have stipulated for the building of a ship and for ten if you fail to build it, it must be considered whether there are two stipulations, one absolute and the other conditional, and whether the fulfillment of the condition in the latter does not extinguish the prior stipulation, or whether, indeed, the latter incorporates the first into it and a novation of the first, so to speak, occurs. The last is the sounder opinion.

45 PAUL, *Plautius, book 5:* A person who owes Stichus in terms of a stipulation is not liable if he manumitted the slave before being in delay, and the slave died before the promisor was sued in respect of him; for it does not appear to be due to his fault that he did not hand over the slave.

46 PAUL, *Plautius, book 7:* A lunatic and a *pupillus* are liable even without the authority of their curator or their tutor, if the action arises in respect of property, for instance, if I hold land in common with them and I have incurred some expense on it, or the *pupillus* has caused harm to it; for they will be liable in an action for division of common property.

47 PAUL, *Plautius, book 14:* Arrianus said that it makes a great difference whether you ask whether someone is liable or whether he is discharged; when the question is about liability, we ought to be more inclined to refute it if we have the opportunity; when it is about its discharge, we ought conversely to hold that you are more entitled to discharge.

48 PAUL, *Plautius, book 16:* In any transactions in which speech is not required but consent is sufficient, such as hire, sale, and other like contracts, a deaf person can also take part seeing that he is able to understand and to consent.

49 PAUL, *Plautius, book 18:* Actions arising from contracts are available against the heirs, even if a wrong is also involved, for example, if a tutor in the administration of his tutelage, or a person with whom property has been deposited, acted fraudulently; in such a case even when a son-in-power or a slave has committed a wrong of this kind, an action on the *peculium*, and not a noxal action, is allowed.

50 POMPONIUS, *From Plautius, book 7:* That which a person promises, or is condemned, to give in a certain year he is empowered to give on any day in that year.

51 CELSUS, *Digest, book 3:* An action is nothing else but the right to recover by judicial process that which is owing to one.

52 MODESTINUS, *Rules, book 2:* We are bound either *re*, or verbally, or by both of these at the same time, or by consent, or by statute, or by praetorian law, or by necessity, or by wrongdoing. 1. We are bound *re* when property itself is involved. 2. We are bound by word of mouth, when a question is first put and a corresponding answer is given. 3. We are bound equally *re* and by word of mouth, when we consent to some property, and the property also accompanies the question. 4. By virtue of our acquiescence we are of necessity regarded as being bound by consent. 5. We are bound by statute when in obedience to statutes we do some act in accordance with the provision of the statute or against it. 6. We are bound by praetorian law in those matters which are directed to be done, or prohibited from being done, by the permanent Edict or by a magistrate. 7. Persons who are not allowed to do any act other than that which they are directed to do are bound by necessity; and this is what happens in the case of a necessary heir. 8. We are bound by our wrongdoing, when the crux of the inquiry turns on a wrongful act. 9. Mere consent too is sufficient for an obligation, even though this can be expressed in words. 10. But most of these are constituted also by a mere nod.

53 MODESTINUS, *Rules, book 3:* Several wrongs in connection with the same thing give rise to several actions, but it is agreed that not all actions may be used; for if several actions arise from one obligation, one action alone and not all must be used. 1. When

we add in general terms "to him to whom the property shall belong," we include both the persons who have been arrogated and those who succeed to us by other right.

54 MODESTINUS, *Rules, book 5:* Even in the case of sales fictitious contracts do not create a legal obligation, since the genuineness of the act is simulated while the true facts do not exist.

55 JAVOLENUS, *Letters, book 12:* In all the cases in which ownership is transferred, the intention of both contracting parties must concur; for whether the cause of contract was sale, gift, hire, or any other cause, that which has been begun cannot be brought to fruition, unless the intent of both parties is in agreement.

56 POMPONIUS, *Quintus Mucius, book 20:* Any actions which have become available to me through the medium of my slave, whether under the *Twelve Tables* or the *lex Aquilia,* or from *injuria* or theft, continue to exist, even if the slave should subsequently be manumitted or alienated or die. But even a *condictio* for theft remains competent, unless I alienated or manumitted the slave after having obtained possession of him [again].

57 POMPONIUS, *Quintus Mucius, book 36:* In all transactions which have been entered into, whether they be of good faith or not, if some error should occur, so that, say, the buyer or hirer understands one thing, and the party who contracts with them another, the transaction is of no effect. And the same answer must also be given if a partnership is entered into, so that if the parties form different views, the one understanding one thing and the other another, that partnership is of no effect, as it rests on the consent of the parties.

58 (59) LICINNIUS RUFINUS, *Rules, book 8:* A *pupillus* who receives money on loan is not bound, not even by natural law.

59 (58) CALLISTRATUS, *Monitory Edict, book 1:* It must be remembered that in all cases which have reached joinder of issue the suit transmits to the heir as well as to like persons.

60 ULPIAN, *Edict, book 17:* Penal actions which are concurrent with respect to the same money do not bar one another.

61 SCAEVOLA, *Digest, book 28:* The procurator of Seius penned a document to a maker of silver vessels, writing the words below: "I, Lucius Calendius, acknowledge that the balance as written above, which is due to him from us, amounts to so much." My question is whether he could bind Gaius Seius. The answer was that Seius, if he was not otherwise bound, was not bound because of what was stated in the document which was produced. 1. Seia, wishing to fix a salary, sent a letter as follows: "To Lucius Titius, greeting. If you are of the same mind and of the same regard to me as you have always been, then, on receipt of my letter, forthwith dispose of your estate, and come here; I shall provide you with ten yearly for as long as I live. For I know that you love me very well." My question is whether, if Lucius Titius did sell his estate and went to her and since that time has been with her, the annual salary is due to him in terms of this letter. The answer was that the person having cognizance of the case shall have to decide from the persons and the circumstances whether an action ought to be granted.

BOOK FORTY-FIVE

1

VERBAL CONTRACTS

1 ULPIAN, *Sabinus, book 48:* A stipulation can only be effected when both parties can speak, and therefore neither a mute nor a deaf person nor an *infans* can contract a stipulation; nor, indeed, can someone who is not present, since they should both be able to hear. If, therefore, such a person wishes to take a stipulation, he does so through a slave who is present and acquires an action on a stipulation. Also if someone wishes to be bound by an obligation, let him order it, and he will be bound in respect of the order. 1. When someone who is present asks a question but leaves before a reply is made to him, he makes an ineffective stipulation; if, however, he is present and asks, then leaves, and the reply is made to him on his return, he creates an obligation; for the interval between does not vitiate the obligation. 2. If a man asks, "will you give," and the other replies, "why not," he will certainly be in the position of being bound, but not if he has nodded assent without speaking. For it is a matter not only of civil but also of natural law that a man who nods assent in this way is not bound; and for that reason it is right to say that a guarantor on his behalf is equally not bound. 3. If someone who is asked without qualification replies, "if such and such happens, I shall give," it is clear that he is not bound; or if he is asked, "within five days of the Kalends," and replies, "I shall give on the Ides," it is equally clear that he is not bound; for he did not reply in the same terms as the question. And contrariwise, if he was asked conditionally and replied unconditionally, it must be said that he is not bound. When he adds anything to the obligation or subtracts from it, it is always agreed that the obligation is vitiated, unless the stipulator immediately approves the variation in the reply; for in that case another stipulation seems to have been contracted. 4. If, when I stipulate, "ten," you reply, "twenty," it is clear that an obligation has been made only for ten. Conversely, also, if I ask for "twenty" and you reply, "ten," an obligation will only have been made for ten. For granted that the sum ought to be consistent, yet it is absolutely obvious that ten is part of twenty. 5. But if, when I stipulate Pamphilus, you promise Pamphilus and Stichus, I think that the addition of Stichus should be regarded as superfluous. For if there are as many stipulations as there are objects stipulated, there are, in a manner of speaking, two stipulations: one effective, the other ineffective; and the effective one is not vitiated by this ineffective stipulation. 6. It makes no difference whether the reply is made in the same language or in another. For instance, if a man asks in Latin but receives a reply in Greek, as long as

the reply is consistent, the obligation is settled. Whether we extend this rule to the Greek language only or even to another, such as Punic or Assyrian or some other tongue, is a matter for doubt. The writings of Sabinus, however, allow it to be true that all tongues can produce a verbal obligation, provided that both parties understand each other's language, either of their own accord or by means of a truthful interpreter.

2 PAUL, *Sabinus, book 12:* Some stipulations consist of giving, some of doing. 1. Out of all these, some permit a partial payment, for example, when we stipulate that ten should be given; some do not, such as those which naturally admit of no division, for example, when we stipulate a right of way in person or with cattle. Some, in fact, naturally permit a partial payment, but unless the whole is given the stipulation is not satisfied, for example, when I generally stipulate a man or a dish or any vessel. For if a portion consisting of Stichus has been paid, no discharge has yet been effected in any part of the stipulation, but he can either be immediately reclaimed, or the matter is undecided until the other is given. The following stipulation "that Stichus or Pamphilus is to be given" is on the same lines. 2. Therefore, with stipulations of this sort, not even heirs can be discharged by a partial payment, so long as they have not all given the same thing; for the terms of the obligation are not altered in accordance with the person of the heirs. Therefore, if the promised object does not permit division, for example, a right of way, the heirs of the promisor are individually liable for the whole sum. Where, however, one of the heirs has paid the whole sum, he has the right to reclaim it from his co-heir by an action for dividing an inheritance. As a result of this, it even happens, Pomponius says, that the heirs of one who stipulated for a right of way or passage also have individually an action for the whole sum. Some people, however, think that in this case the stipulation is annulled, because a servitude cannot be acquired by separate individuals; but difficulty of payment does not render a stipulation ineffective. 3. If, however, having stipulated a man, I sue one of the heirs of the promisor, only the share of the others remains as an obligation that can also be paid. The same applies if something has been credited to one of the heirs. 4. What I have said with regard to heirs is true also for the promisor himself and his guarantors. 5. Again, if the stipulation is one of doing, for example, if I stipulate thus, "do you promise that neither through you nor your heir will anything be done to prevent me from being able to have a right of way," and one of several heirs hinders me, his co-heirs are in fact liable but can claim back from him what they have paid by an action for dividing an inheritance. Both Julian and Pomponius confirm this. 6. On the other hand, if a stipulator who has stipulated that he and his heir should have a right of way dies, and one of his heirs is hindered, we shall say that it makes a difference whether the stipulation was made for the whole sum or in respect of the share of the one who was hindered. For if a penalty has been added to the stipulation, it is made for the whole; but those who have not been hindered will be removed by a defense of fraud; but if no penalty has been imposed, then the stipulation is made only in respect of the share of the one who was hindered.

3 ULPIAN, *Sabinus, book 49:* The rule is the same in the case of this stipulation: "Do you promise that I and my heir are permitted to have?" 1. But this difference is for the reason that when one of the heirs is hindered, his co-heir cannot have an action on a stipulation, since he has no interest in it, unless a penalty has been added. For the addition of a penalty has the effect of making the stipulation for all, because here we do not ask whom it concerns. Certainly, when one of the heirs causes the hindrance, all the heirs are liable; for it is in the interest of the man hindered not to be hindered by anyone.

4 PAUL, *Sabinus, book 12:* We also say the same if I have stipulated that there should be no fraud by you or your heir, and either the promisor or the stipulator has died leaving several heirs. 1. Cato wrote in his fifteenth book that when a penalty of a specified amount has been promised if anything different occurs, if on the death of the promisor one out of several heirs acts contrary to what was provided, the penalty should be incurred either by all the heirs in proportion to their shares in the inheri-

tance or by the one in proportion to his share; by all, if that act concerning which the provision was made was indivisible, for example, "that there should be a right of way," because that which cannot be divided into shares is held to have been, in a manner of speaking, done by all. But if the provision was for something which permits a division, for example, "to bring no further action," then the heir who has acted contrary to that should alone incur the penalty in proportion to his share of the estate. This is the reason for the difference; that in the former situation all are held to have incurred the penalty, because the fault could only have been committed in respect of the whole sum; but with this stipulation, "do you promise that it will not be through your fault that I am prevented from having a right of way," let us see whether the same does not apply here, or rather the same as in this stipulation, "do you promise that Titius and his heir will confirm"; for in this latter stipulation a single person will be liable, the man who does not confirm, and a single person will sue, the man by whom the claim is made. This is the opinion of Marcellus also, although the principal cannot himself give partial confirmation. 2. If a man who took a *stipulatio duplex* dies leaving several heirs, each one of them, in proportion to his share, will have an action for recovery of that share. The same applies also in a stipulation relating to profits and threatened damage and notice of new work. However, there can be no partial restitution of the work on notice of new work. This view is accepted for the sake of equity as far as concerns the stipulators; neither restitution nor defense can, however, apply partially to the promisor.

5 POMPONIUS, *Sabinus, book 26:* Some stipulations are judicial, some praetorian, some conventional, some both praetorian and judicial. Judicial stipulations are only those which originate from the true office of a judge, such as a *cautio* for fraud; praetorian stipulations are those which originate from the true office of the praetor, such as threatened damage. Praetorian stipulations, however, ought to be understood in such a way as to include also aedilitian stipulations; for these also proceed from jurisdiction. Conventional stipulations are those which come about as a result of an agreement between the parties, and there are as many kinds of these as, I might almost say, there are things which can be the subject of a contract. For they come about because of the actual verbal obligation and depend upon the business transacted. Common stipulations are, for example, that the property of the *pupillus* will be safe; for a praetor orders that there should be a *cautio* that the property of the *pupillus* will be safe, and sometimes a judge, if this matter cannot be concluded otherwise. Also a stipulation for double the price comes from a judge or from the aedile's edict. 1. A stipulation is a verbal expression in which the man who is asked replies that he will give or do what he has been asked. 2. The accepting of security is a stipulation, which binds the promisor in such a way that the guarantors, that is, those who promise the same thing, on his behalf are also accepted by the stipulator. 3. To accept security has been said to be on the same lines as giving of satisfaction; for because a person was paid that with which he was content, it is said that satisfaction has been given; and similarly, because things such as would content a person were given in such a way as to be verbally binding, it is said that security has been accepted. 3a. Suppose that you promise capital and a penalty if it is not paid, even if one of your heirs pays his share out of the capital, nonetheless, he incurs the penalty until the share of his co-heir is paid. 4. It is the same in the case of the penalty arising from a mutual promise, if one party has obeyed the judge's decision and the other has not; but satisfaction should be given him by his co-heir. For in stipulations of this kind no other decision can be made without injury to the stipulator.

6 ULPIAN, *Sabinus, book 1:* When someone against whom there is an interdict on property acquires by stipulation, he cannot transfer or be bound by a promise; and therefore a guarantor is also unable to become surety on his behalf, just as in the case of a lunatic.

7 ULPIAN, *Sabinus, book 6:* When an impossible condition for the doing of something is drawn up, it is an obstacle to stipulations; except where a condition such as this is inserted into the stipulation, "if he does not ascend into heaven"; for this is valid and immediate and safeguards a loan.

8 PAUL, *Sabinus, book 2:* In the case of the stipulation, "if you do not give me Stichus on the Kalends, do you promise to give me ten," it is asked whether, on the man's death, it is possible for an action to be brought immediately, before the Kalends. Sabinus and Proculus think that the plaintiff must wait for that date, which is the better view; for the entire obligation is conditional, and deferred to a certain date; and granted that it seems that there is a fault in relation to the condition, yet that date is still to come. An action, however, can be brought instantly against a man who made a promise in these words: "if he does not touch the sky with his finger before the Kalends." Marcellus also confirms this.

9 POMPONIUS, *Sabinus, book 2:* If Titius and Seius have separately stipulated, "do you promise to give me that farm, if you have not given it to him," there will be an intention of giving it to either until an action is received; and therefore there will be an action of the occupant.

10 POMPONIUS, *Sabinus, book 3:* We apply this rule, that on this stipulation "if Lucius Titius does not arrive in Italy before the Kalends of May, do you promise to give ten," nothing can be claimed before it has been ascertained that Titius could not and did not arrive in Italy before that date, whether it happened that he was alive or dead.

11 PAUL, *Sabinus, book 2:* If a son takes a stipulation while in the *civitas*, he is held to have acquired for his father on his [the father's] return from enemy hands.

12 POMPONIUS, *Sabinus, book 5:* If I make this stipulation, "do you promise that ten or five will be given," five is the amount owing; and if this is the stipulation, "do you promise that it will be given on the Kalends of January or February," it is the same as if I had stipulated: "on the Kalends of February."

13 ULPIAN, *Sabinus, book 19:* When a man stipulates, "before the next Kalends," he is like a man who stipulates: "on the Kalends."

14 POMPONIUS, *Sabinus, book 5:* If I have taken a stipulation from you "that a house should be built," or I have laid an obligation on my heir to build a block of flats, Celsus thinks that no action can be brought in this case before a space of time has passed in which a block can be built; nor will the appointed guarantors be liable before that date.

15 POMPONIUS, *Sabinus, book 27:* And, therefore, there is some doubt, if some part of the block was built, but then destroyed by fire, whether the entire space of time for building the block should be counted again or whether one should in fact only wait for the remaining period which was outstanding. The better view is that he should be granted the entire period.

16 POMPONIUS, *Sabinus, book 6:* If you owe me Stichus or Pamphilus and one of the two becomes mine for some reason, you owe me the remainder of the debt. 1. A stipulation of this type, "every year," is a single one, and both uncertain and perpetual, and is not terminated as is a legacy by the death of the legatee.

17 ULPIAN, *Sabinus, book 28:* A stipulation is not valid when a condition is entrusted to the judgment of the party making the promise.

18 POMPONIUS, *Sabinus, book 10:* If a man promises the same thing twice, he is not automatically more liable than if he promises it once.

19 POMPONIUS, *Sabinus, book 15:* If a stipulation is made, "do you promise that such and such will be given if it is through your fault that a divorce occurs," the stipulation is null and void, because we ought to be content with the statutory penalties, except where the stipulation contains just the same penalty as is prescribed by law.

20 ULPIAN, *Sabinus, book 34:* Stipulations of this kind, "do you promise to give me what Titius owes you, when he ceases to be your debtor," are not invalid; for the stipulation is valid just as if drawn up under some other condition.

21 POMPONIUS, *Sabinus, book 15:* Suppose that after a divorce, a woman who has no dowry stipulates that a hundred will be given under the heading of dowry, or a woman who has only a hundred stipulates that two hundred will be given under the heading of dowry; Proculus says that if the woman who has one hundred stipulates two hundred,

there is no doubt that the hundred comes within the obligation, and that the other hundred is owing in an action on dowry. Therefore, it must be said that even if there is no dowry, yet the hundred comes within the stipulation, just as, when something is left under the heading of dowry to a daughter or mother or sister or any other woman, the legacy is valid.

22 PAUL, *Sabinus, book 9:* If I take a stipulation from you for something which I thought was gold, when it was bronze, you will be liable to me in respect of this bronze, since we were agreed upon the essential object; but if you knowingly cheated me, I shall have an action against you as a result of the clause on fraud.

23 POMPONIUS, *Sabinus, book 9:* If by reason of a legacy or as a result of a stipulation you owe me a certain man, you will not be liable to me after his death, except where it was your fault that you did not give him to me when he was still alive. This happens if you either failed to give him when requested or killed him.

24 PAUL, *Sabinus, book 9:* If, however, a *pupillus* owes Stichus as a result of a stipulation, it will not be held that the delay has occurred through him, so as to make him liable on the man's death, except where he is asked to pay with his tutor's authorization or the tutor alone is asked.

25 POMPONIUS, *Sabinus, book 20:* If I stipulate that I should be given what is already owing to me on a stipulation and the promisor in the earlier stipulation is protected by reason of a defense, he will be bound as a result of the later stipulation, because the earlier one is, as it were, nullified by the opposing defense.

26 ULPIAN, *Sabinus, book 42:* We generally recognize that immoral stipulations have no validity,

27 POMPONIUS, *Sabinus, book 22:* for instance, if a man promises to commit murder or sacrilege. Indeed, it is a part of the praetor's duty to refuse an action on obligations of this kind. 1. If I stipulate in this way, "do you promise that something will be given if you do not climb the Capitol within two years," I cannot properly make a claim unless the two years have passed.

28 PAUL, *Sabinus, book 10:* If we stipulate that property should be transferred, we do not mean that ownership of it should be given to the stipulator, but merely that it should be transferred.

29 ULPIAN, *Sabinus, book 46:* We ought to know that in the case of stipulations, there are as many stipulations as there are sums of money, and as many stipulations as there are items stipulated. Accordingly, it happens that when a single sum or item is introduced, which was not in the preceding stipulation, there is no novation, but it brings about two stipulations. However, although it is agreed that there are as many stipulations as sums of money, and as many as there are articles of property, yet if a person stipulates money which is in full view, or a heap of money, there are not as many stipulations as there are actual coins, but a single stipulation; for it is ridiculous that there should be individual stipulations for each individual denarius. It is also clear that a stipulation of legacies is single, although there may be more than one object or more than one legacy. A stipulation of a household or of all the slaves is also single; and so is a stipulation of a four-horse team or litter-bearers. But if a man stipulates this and this, there are as many stipulations as there are objects stipulated. 1. If I take a stipulation of a man from a thief, it is asked whether the stipulation is valid. This poses a question, because I seem to have stipulated for a man who was for the most part mine; a stipulation of this type, in fact, where someone stipulates for his own property, is not valid. It is also clear that if I stipulate in these words, "do you promise me what you ought to give and to do by reason of a *condictio*," the stipulation is valid; but if I have stipulated that the man should be given, the stipulation is null and void. But if it is supposed that the slave died immediately afterward, Marcellus says that the thief is not liable by *condictio*; for as long as he is alive, he can be the subject of a *condictio*, but if it is supposed that he has died, the situation is such that the *condictio* loses its effect because of the stipulation.

30 ULPIAN, *Sabinus, book 47:* It should be generally known that if a man writes that he has guaranteed them, everything is regarded as having been carried out in a proper manner.

31 POMPONIUS, *Sabinus, book 24:* If I stipulate my own property conditionally, the stipulation is valid if the property is not mine at the time when the condition comes into force.

32 ULPIAN, *Sabinus, book 47:* If there was a mistake in the name of the slave whom we stipulate is to be given, although the substance of the stipulation was clear, it seems right that the stipulation should be valid.

33 POMPONIUS, *Sabinus, book 25:* If Stichus has been promised to be given on a certain date and dies before that date, the promisor is not liable.

34 ULPIAN, *Sabinus, book 48:* It makes a good deal of difference whether I stipulate a thing with regard to which I can have no *commercium* or someone else promises it; if I stipulate a thing with regard to which I cannot have *commercium*, it seems right for the stipulation to be invalid; if someone promises a thing with regard to which he has no *commercium*, he harms himself, not me.

35 PAUL, *Sabinus, book 12:* If I stipulate that something should be done which nature does not allow to happen, the obligation no more holds good than when I stipulate that something should be given which cannot be given, unless it is someone's own fault that he cannot do it. 1. Also in relation to what statutes forbid to be done, if this is to be a permanent prohibition, the contract is void, for example, if someone stipulates that his sister will marry him; although, even if it is not necessarily permanent, as occurs in the case of an adopted sister, the same must be said, because it would at the outset be contrary to morality. 2. If in hiring, selling, or buying a man does not reply when asked and yet consents, the transaction is valid, because these contracts are confirmed not so much by words as by consent.

36 ULPIAN, *Sabinus, book 48:* If a man is put under an obligation in a certain way by trickery, although it was proper for him to be differently bound, he in fact will be bound by the exact letter of the law but can use the defense of fraud; for since he was bound by means of fraud, the defense is due to him. It is the same if no fraud on the part of the stipulator has intervened, but the matter itself contains an element of fraud; for when a man claims on such a stipulation, he acts fraudulently in making the claim.

37 PAUL, *Sabinus, book 12:* If I stipulate certain moneys, for instance, those which are in a strongbox, and these are lost through no fault of the promisor, we are owed nothing.

38 ULPIAN, *Sabinus, book 49:* This stipulation, "do you promise that we will be allowed to have," entails this, that we should be allowed to have the object in question, and that no one will do anything to prevent us from being allowed to have it. This circumstance means that the defendant seems to have promised, as far as concerns everyone, that it will happen that you should be allowed to have it; he therefore seems to have promised another's act; but no one is bound by promising another's act, and we apply this rule. But he binds himself not to do anything to prevent our being allowed to have it; he is also bound to ensure that neither his heir nor any other of his successors should do anything to prevent our being allowed to have it. 1. If, however, a man promises that something will not be done by another, one must say that apart from his heir, it is ineffective for him to promise another's act. 2. But if a man wishes to promise another's acts, he can promise a penalty or the value of the property. But to what extent will it be held that he is allowed to have it? Only if no one begins a dispute, that is, not the defendant himself nor his heirs nor their successors. 3. If someone

perhaps begins a dispute not over ownership but solely over possession, or usufruct, right of use or any other right which has been sold, it is clear that a stipulation has become operative; for a man is not permitted to have a thing if there be any diminution in the rights which he has. 4. It is sometimes asked whether one can promise that someone should be allowed to have only one's own property or also another's. The better view is that even another's property can be promised; such property will be capable of this, if it has begun to be the property of the promisor. Therefore, if it continues to be the property of another, it must be said that no stipulation has been made, unless a penalty was added, since nothing has been done either by him or by his successor. 5. Just as on the part of the defendant, his successors are liable with him, so also on the part of the plaintiff a stipulation is made by the stipulator himself and others, whoever succeed him, that is to say, if he was not allowed to have the property himself. But if the other person was not allowed to have it, most certainly a stipulation is not made, and it will make no difference whether I stipulate, "should be allowed to have" or "I should be allowed to have." 6. Those who are in the power of another can stipulate that those in whose power they are should be allowed to have a thing by reason of the fact that they can stipulate other things also for these persons. But if a slave stipulates that he should be allowed to have a thing, it is asked whether he is deemed to have made a proper stipulation. Julian says in the fifty-second book of his *Digest* that if a slave stipulates that he should be allowed to have a thing or promises that nothing will be done by him to prevent the stipulator's being allowed to have it, a stipulation, he says, is not made, although property can be taken from him and he can take away the same property; for it is a matter not of fact but of law which is under consideration in this stipulation. But when he stipulates that nothing should be done by the promisor to prevent his being allowed rights of way, it is not the law of stipulation, he says, which is being examined, but an act. But it seems to me, granted that this stipulation retains the legal wording "be allowed to have," that it should be treated just as what is done by a slave or a son-in-power in retaining possession or not taking it away seems to have been properly done, and that the stipulation should have effect. 7. This stipulation also "do you promise that I shall be allowed to possess" is valid. Let us see whether a slave can lawfully receive this stipulation in his own person. And although in civil law a slave cannot possess, yet this should be referred to natural possession; and therefore there ought to be no doubt but that even a slave can properly stipulate thus. 8. Clearly, if the slave stipulated "that he should be allowed to hold," it is right that the stipulation should be valid; for although they cannot possess in civil law, no one doubts that they can hold. 9. "Have" is doubly acceptable; for we apply the word "have" both to the man who is the owner of a thing and to the man who is not the owner, but holds it; lastly, we are accustomed to use the word in relation to property deposited with us. 10. If a man stipulates thus, "that he himself should be allowed to have the usufruct," that stipulation does not apply to his heir. 11. Even if he does not add the word "himself," I do not think that the stipulation concerning usufruct is passed on to the heir, and we apply this rule. 12. However, if someone stipulated that he and his heir should be allowed to have the usufruct, let us see whether the heir can sue on the stipulation; and I think he can, provided that the fruits are separate; for if he also stipulates that he and his heir should be allowed rights of way, we confirm this. 13. If anyone wishes to exclude fraud on the part of the promisor and his heir, it is sufficient to stipulate that "there should not be now or in the future," but if he wishes to guard against fraud by several persons, it is necessary that the following should be added: "Do you promise that money to the value of the property will be given in any case where fraud is not, now or in the future, absent?" 14. A man cannot join the person of his heir with his own person. 15. However, the person of an adoptive father can be so joined. 16. That there is a distinction between an uncertain and a certain date is also apparent by reason of the fact that on the certain date the thing promised can be given immediately; for the whole of the intervening period is left free for the promisor to pay; but someone who promised "if such and such happens" or "when such and such happens" will not seem to have done what he promised unless he gives when that happens. 17. No one can stipulate on behalf of another, except where a slave stipulates for his master, a son for his father; for obligations of this kind were devised in order that each man should acquire for himself what is of benefit to him; but it is of no benefit to

me that something should be given to another. Clearly, if I wish to do this, it is right to stipulate a penalty, so that, if things are not done just as was specified, the stipulation should apply even to the man who does not benefit; for when someone stipulates a penalty, the question under consideration is not what benefit there may be, but the extent and condition of the stipulation. 18. In the case of stipulations, when it is asked what action has been taken, the words are to be understood against the stipulator. 19. When a man says, "ten to me and ten to Titius," he is believed to be speaking of the same ten, not a different ten. 20. If I stipulate on behalf of another, when there is benefit to me, let us see whether a stipulation is made. Marcellus says that the stipulation is valid in a special case of this kind. A man began to administer the tutelage of his *pupillus*, then gave up the administration to his fellow tutor, and stipulated that the property of the *pupillus* would be safe. Marcellus says that it is possible for the validity of the stipulation to be defended; for it is in the interest of the stipulator that what he stipulated should happen, since he would be under an obligation to the *pupillus* if the matter should turn out otherwise. 21. If a man promises or undertakes for hire to build a block of flats, then takes a stipulation from someone that the block should be built for the stipulator; or if a man, when he had promised that Maevius would give a farm to Titius or, if he did not do so, that he himself would pay a penalty, stipulated from Maevius that the farm would be given to Titius; again, if a man leases out that which he himself undertakes for hire to be done, it is clear that he has a valid action on letting. 22. Therefore, if someone has taken a stipulation, when it was to his interest that something should be given to him, he is in a situation where the stipulation is valid. 23. And so, if I have stipulated that something should be given to my procurator, the stipulation will have effect; also if it is in my interest that no penalty should be imposed and that my estates, which had been given as pledges, should not be sold off. 24. If a man makes this stipulation, "do you produce him as a witness," there is no reason why the obligation should not stand. 25. We may stipulate that a sacred building or religious place should be built; otherwise we cannot even have an action on letting.

39 PAUL, *Sabinus, book 12:* A master acquires something for himself on the stipulation of a slave; so does a father on that of a son in accordance with what the laws allow.

40 POMPONIUS, *Sabinus, book 27:* If my son stipulates with my slave, the thing acquired comes to me.

41 ULPIAN, *Sabinus, book 50:* If a man who stipulates "on the Kalends of January" adds "first" or "next," it is clear that there can be no doubt; even if he adds "second" or "third," he equally frustrates any inquiry. If, however, he does not add which January, he introduces an inquiry into the facts of what he may have intended, that is, what business was transacted between them (for certainly we follow the transaction which took place), and we shall adopt that date. If, however, it is not clear, we must say, as Sabinus does, that one should look to the first Kalends of January. Clearly, if a man puts forward a stipulation on the very day of the Kalends, what line should we follow? I think that the transaction should be held to refer to the following Kalends. 1. Whenever a date is not put forward in obligations, the money is owing on that very day, unless an additional reason suggests a space of time in which it can come to him. However, the addition of a date ensures that the money is not owing on the present date from which it is clear that the addition of a date is in the defendant's favor, not the stipulator's. 2. The same is also true for the Ides and the Nones and for all dates in general.

42 POMPONIUS, *Sabinus, book 27:* When someone stipulates that a thing should be given "this year" or "this month," he cannot properly claim it unless the year or month has elapsed in its entirety.

43 ULPIAN, *Sabinus, book 50:* If a man stipulated that restitution should be made to him on the judgment of, say, Lucius Titius, and then the stipulator himself caused a delay, to prevent Titius from giving judgment, the promisor is not liable, as if he had caused the delay. What, then, if the very man who ought to have given the judgment has caused the delay? The better view is that there should be no going back on the person for whose adjudication provision was made.

44 PAUL, *Sabinus, book 12:* And, therefore, if he altogether fails to give a judgment, the stipulation has no validity to the extent that even if a penalty was added, not even that is imposed.

45 ULPIAN, *Sabinus, book 50:* Whatever stipulation is made by a man who is in the power of another will be reckoned on behalf of that person as if he had made the stipulation himself. 1. Just as a person can stipulate for when he dies, so also can those who are subject to another's power stipulate for when they die. 2. If someone makes this stipulation, "do you promise that after my death such and such will be given to my daughter" or "such and such will be given to me after my daughter's death," he has made a valid stipulation. But in the first case an *actio utilis* is appropriate for the daughter, provided that he has no heir. 3. It is possible for us to stipulate not only in these terms "when you die" but also "if you die"; for just as there is no difference between these phrases, "when you come" or "if you come," so there is no difference there between "if you die" and "when you die." 4. A son is held to stipulate for a thing to be given to his father, even if he does not add this.

46 PAUL, *Sabinus, book 12:* "That it should be given on the hundredth Kalends" is a valid stipulation for us, since the obligation is immediate, but the payment is deferred to that date. 1. It is not, however, possible to put off to the time of death something which is a question of action, such as, "do you promise to come to Alexandria when you die?" 2. If I stipulate with the words "when you wish," some say the stipulation is invalid, others that it is invalid only insofar as if you die before you make the decision, which is true. 3. However, the stipulation "do you promise to give, if you wish" is clearly invalid.

47 ULPIAN, *Sabinus, book 50:* When a man stipulates thus, "do you promise to give me what you ought to give me on the Kalends," it seems that he makes the stipulation not today, but on the day he names, that is, the Kalends.

48 ULPIAN, *Edict, book 26:* If I stipulate that ten are to be given "when I claim," the stipulation contains a sort of reminder, so that they may be paid more quickly and without delay, rather than a condition; and therefore, even if I die before I make the claim, the condition does not seem to have failed.

49 PAUL, *Edict, book 37:* When a son-in-power promises that Stichus should be given and, when it is his own fault that he does not give him, Stichus dies, an action on the *peculium* is granted against the father, as long as the son remains bound by the stipulation. But if the father was the cause of the delay, the son will not be liable, but an *actio utilis* should be granted against the father. All this is also said in the case of a guarantor. 1. Suppose that I stipulate: "do you promise that nothing will be done by you to prevent my being allowed rights of way" and that I accept a guarantor. Then if the guarantor is at fault, neither will be liable, if the promisor, then each will be liable. 2. In the case of the stipulation, "do you promise that nothing will be done either by you or by your heir," it seems that it is done by the heir, even though he is absent and does not know and on that account does not do what ought to be done in accordance with the stipulation. However, it does not seem to be the fault of the *pupillus* in a stipulation of this kind, if the *pupillus* is the heir. 3. If the promisor of a man is asked to pay before the day on which he had promised the slave and the slave dies, he does not seem to be at fault.

50 ULPIAN, *Edict, book 50:* In the case of the stipulation, "that nothing will be done by you," this does not mean that you will do nothing to prevent your being able to act, but that you will take care that you are able to act. 1. Again, in a stipulation in respect of a purchased inheritance, "for the amount of money which comes to you or through fraud on your part is or will be prevented from coming," no one will doubt that a man who so handled the matter that nothing came to him will be liable.

51 ULPIAN, *Edict, book 51:* Someone who makes a promise of another's slave cannot be held liable in the action on stipulation if he is manumitted; it is enough that he avoid fraud or negligence.

52 ULPIAN, *Disputations, book 7:* In contractual stipulations the parties supply the form of the contract. Praetorian stipulations take their validity from the will of the praetor who published them with the result that nothing can be altered in praetorian stipulations either by adding or taking away. 1. If someone promised to convey vacant possession, such a stipulation does not refer to the simple fact but to the rights in the property.

53 JULIAN, *Digest, book 16:* It is convenient for stipulations to be so framed that they contain every term which is particularly required. However, the provision against fraud applies to those cases which cannot obtain immediately and which refer to unforeseen circumstances.

54 JULIAN, *Digest, book 22:* Sometimes stipulations are concluded particularly, sometimes generically. When we stipulate particularly, the stipulation must be so divided between the principals and between their heirs that parts of the whole are owed to each. Whenever we stipulate generically, a quantitative division is made. So when someone who stipulated for Stichus and Pamphilus left two heirs in equal shares, each must be owed a half share in Stichus and in Pamphilus; if he had stipulated for two slaves, a single slave would be due to each heir. 1. A stipulation of day works is similar to those stipulations made generically, and so the division of such a stipulation produces not separate tasks but a number of days. Whereas, if a jointly owned slave stipulated for one day's labor, each of the masters must sue for a proportion of the day's work depending on their shares in the slave. The discharge of this obligation is made easier if the freedman prefers to tender the value of the labor or if the patrons agree that the job should be done for them jointly.

55 JULIAN, *Digest, book 36:* When someone stipulates for something to be given to himself or to Titius, it can be discharged only by delivery to Titius and not to his heirs.

56 JULIAN, *Digest, book 52:* Someone who stipulates, "do you promise to give me and Titius ten," is, however, always taken to have stipulated one lot of ten jointly to himself and Titius, just as someone who leaves a legacy to Titius and Sempronius is understood to have left one lot to both. 1. "Do you promise that ten will be given by you and Titius your heir?" The mention of Titius is wholly superfluous; for either he will be left sole heir and so be liable in full, or, as heir to part, he will be liable to the same extent as his co-heirs. Although he be supposed to have agreed with the intention that Titius be liable rather than another heir, yet this bare promise will be useless to the co-heirs. 2. Someone who stipulates for something to be given to himself or to his son clearly involves the son in the contract to the extent that it can be effectively discharged through him. It does not matter whether he stipulates for himself or someone else or for himself or his son in which case the contract can be effectively discharged whether the son remains in power or is emancipated. Nor is it to the point if someone receives himself what he has stipulated for delivery to his son; for the stipulator added the son's name that he might be understood to have employed the son not to acquire an obligation but in order to discharge one. 3. Whereas if someone stipulates for delivery to his son [in his power] only, this cannot be discharged properly by delivery to the son because the mention of the son is made to create rather than to discharge the obligation. 4. Whoever stipulates, "do you promise to give ten while I am alive," can properly sue immediately for the ten but his heir will be met with the defense of agreed pact, because it is obvious that the stipulator intended in this way to prevent his heir's suing. So one who stipulates for something to be given until the first of the month can indeed sue even after the first but will be met with the defense of pact. 5. Whoever stipulates, "do you promise delivery before the first of next month," is no different from one who stipulates for "delivery on the first." 6. Whoever has the bare title without the usufruct can properly stipulate for the usufruct to be delivered to him; for the subject of the contract is something which he could, but does not, enjoy.

7. If I stipulate from you for the Sempronian estate and then I stipulate for the same estate less the usufruct from someone else, the first stipulation will not be novated, because you can not be released by the delivery of the estate less the usufruct; but I could still properly sue you for the usufruct. What then? When you deliver the estate to me, the one from whom I took a stipulation for the estate less the usufruct will be released. 8. If a slave for whom I stipulated from Titius were promised to me conditionally by Seius and, pending the condition while Titius delayed, the slave died, I can at once sue Titius; but Seius will not incur liability even if the condition be fulfilled. But if I had formally released Titius, then Seius would be liable once the condition were fulfilled. There is this difference; by the death of the slave the object of the obligation is lost; but where a formal release is given, the slave remains whom Seius promised.

57 JULIAN, *Digest, book 53:* If someone promised, "ten to be paid if Titius become consul," although the promisor die while the condition is unfulfilled, he bequeaths the obligation to his heir.

58 JULIAN, *Digest, book 54:* Whoever stipulates for the usufruct of an estate and then for the estate itself is like one who stipulates for a part and then for the whole of an estate, because it is assumed that "the estate" cannot be conveyed once the usufruct has been subtracted. Conversely, whoever stipulates for the estate and then the usufruct is like one who stipulates for the whole and then for a part. Whoever stipulates for a right to drive cattle and then for a right of way gains nothing by the latter stipulation, just as someone who stipulates for ten and then five gains nothing. So again one who stipulates for a usufruct and then for a right of use gains nothing. Unless in each case it is expressly stated that it is done by way of novation; for then, on the former obligation's expiring, a claim becomes available on the basis of the second, and so the right of way as well as the right of use and the five can be sued for.

59 JULIAN, *Digest, book 88:* Whenever anyone stipulates for oil under a time clause or other condition, its value ought to be assessed when the obligation vests; for from that moment it can be sued for. If it is otherwise, the loss is the debtor's.

60 ULPIAN, *Edict, book 20:* The same applies if someone were to stipulate for a pound of oil in Capua; the valuation is made at the moment when he can sue; but he cannot sue until he comes there.

61 JULIAN, *Urseius Ferox, book 2:* A stipulation was framed as follows: "Do you promise to pay me so much if you do not make me your heir?" It is void because such a stipulation is contrary to sound morals.

62 JULIAN, *From Minicius, book 2:* If a slave takes a stipulation from another for money against his master's express wish, the promisor is in no way obliged to the master.

63 AFRICANUS, *Questions, book 6:* If someone stipulates, "if either the ship arrive from Asia or Titius become consul," whichever condition first matures makes the stipulation binding, and it cannot be further implemented. But when one of two disjunctive conditions fails, the remaining one must mature for the stipulation to become binding.

64 AFRICANUS, *Questions, book 7:* A stipulation of this form was entered into: "If Titius become consul, do you promise to give ten every year from that day?" Three years later the condition was satisfied. It can reasonably be doubted whether one could sue in respect of this period. He replied that the stipulation was valid so that for each year that elapsed before the condition was fulfilled payment was taken to be due; for his

opinion is that when Titius became consul ten were due for each year taking into account also the intervening period.

65 FLORENTINUS, *Institutes, book 8:* Whatever you add to a stipulation which is impertinent and irrelevant to the issue is taken to be superfluous and will not vitiate the obligation, for example, if one says, "I tell of arms and the man; I promise," it is nonetheless valid. 1. And if there is a variation in the matter promised or in the names of the parties, this is not fatal. You will be bound by a promise of a quantity of gold coins to one stipulating for pence and you will be bound by a promise to Titius given to his slave stipulating on behalf of Lucius his master who is the same man.

66 PAUL, *Lex Aelia Sentia, book 3:* If someone under twenty stipulate from his debtor "a slave to be released," the stipulation will not be enforced. But if he be over twenty, there is nothing to prevent the manumission because the statute refers only to those under that age.

67 ULPIAN, *Edict, book 2:* A stipulation in this form is valid: "Do you promise to safeguard ten thousand?" 1. Someone who takes a stipulation "to ensure that ten will be given" cannot sue for the ten because the promisor could be released by producing a solvent debtor. So Labeo; and Celsus draws attention to the point in the sixth book of his *Digest.*

68 PAUL, *Edict, book 2:* If I were to stipulate for a penalty in case you did not pay me money, this stipulation is both certain and valid. But if I take a stipulation as follows, "do you promise whatever sum will be owing," this is uncertain because the amount of my interest in the matter figures in the stipulation.

69 ULPIAN, *Edict, book 6:* If a man is dead he cannot be produced and no penalty is incurred for something that is impossible, just as if someone who stipulated for the delivery of Stichus, now dead, stipulates for a penalty if he is not delivered.

70 ULPIAN, *Edict, book 11:* A married woman who gave her dowry to my associate Glabrio Isidorus made him promise the dowry to her infant child if she should die married. She did die during the marriage, but it was agreed that the action on stipulation was not available since one who could not speak could not have stipulated.

71 ULPIAN, *Edict, book 13:* When a stipulation is taken that something be done subject to penalty, it should be cast in this form: "if it be not so done"; when that something be not done, in this form: "if the contrary be done."

72 ULPIAN, *Edict, book 20:* Stipulations concerning matters which cannot be separated such as rights of way, of carriage, of driving cattle, of leading water, and other servitudes cannot be severed. I think the same true if someone stipulates for something to be done, as, for example, the conveyance of an estate or the digging of a ditch or the erection of a block of flats or for day works or something similar; for the division will destroy the stipulation. Celsus, however, in the thirty-eighth book of his *Digest,* cites Tubero as of the opinion that where we stipulate for something to be done, if nothing be done, we ought to be paid money and so in this way the stipulation can be severed. Celsus says that it was his opinion that it is possible to allow a claim to be brought for a proper evaluation of what was to be done. 1. If someone stipulates as follows, "if the work is not finished before the first of March, payment of whatever the job is worth," then the promise vests not on the day upon which the work is agreed but after the first of March because the defendant could not be bound by the promise before the first of March. 2. Clearly, if someone stipulates for "the shoring up of a block of flats," it is not contemplated that there will necessarily be an action if the block collapses. Nor can one sue for "the erection of a block" just because time in which a block could have been constructed has elapsed. But where there is a delay in the erection of the block, then one can sue and the obligation vests.

73 PAUL, *Edict, book 24:* Sometimes an unconditional stipulation involves a delay by its

very terms, as, for example, if one stipulate for an unborn animal or unharvested fruit or a house yet to be built. In this case, the action is available as soon as the object can be provided in the normal course of events. Similarly, someone who stipulated to deliver in Carthage is assumed to allow for the time it takes to get to Carthage. Again, if one stipulate for day works from a freedman, the obligation does not vest until the day which was appointed and which has not yet arrived. 1. If a slave belonging to an inheritance stipulate, this stipulation will have no effect until the inheritance is accepted, as if this were a condition. The same applies to a slave of someone captured by the enemy. 2. One who promised Stichus atones for his delay in delivery; certainly, the defense of fraud will be available in case of refusal to accept the proffered money.

74 GAIUS, *Provincial Edict, book 8:* Some stipulations are certain, some uncertain. That is certain wherein it appears from the terms what, of what quality, and how much is due, as, for example, ten gold coins, the Tusculan estate, the slave Stichus, a hundred measures of best African corn, a hundred jars of best Campanian wine.

75 ULPIAN, *Edict, book 22:* When, however, it does not appear from the wording of the stipulation what, of what quality, and how much is due, then the stipulation is said to be uncertain. 1. Therefore, if someone stipulate to deliver an estate without addition or a slave generally without his name or wine or corn without specifying its quality, the subject of the stipulation is uncertain. 2. So much so that if someone stipulate for "a hundred measures of good African corn" or "a hundred jars of good Campanian wine," he is taken to have stipulated for a thing uncertain, because of what is good a better can be found. From which it follows that calling something good does not indicate something certain because that which is better than good is itself also good. But when someone stipulates for the best he is taken to stipulate for that whose quality is of the first grade and this ensures that such a term indicates something certain. 3. If someone stipulate for a usufruct of a certain estate, the subject of the obligation is taken to be uncertain. This is indeed the current legal position. 4. If someone stipulate for the delivery of whatever should be born to the slave-girl Arethusa or whatever fruits should be produced on the Tusculan estate, it appears doubtful whether the stipulation is taken as certain. But it is very clear that by its nature this stipulation is for something uncertain. 5. But one who stipulates for the wine, oil, or corn, which is in a warehouse, is understood to stipulate for something certain. 6. Whoever takes a stipulation in the following terms from Titius, "do you promise to pay whatever Seius owes me," and whoever stipulates, "do you promise to pay whatever you owe me on the will," makes the subject of the obligation uncertain, although Seius owe a certain sum and something certain be owed under the will. But these examples can scarcely be distinguished from that which we mentioned above about the wine, oil, or corn which was lying in the warehouse. Yet it is the case that guarantors are taken to promise a thing certain, if indeed he on whose behalf they are bound owes something certain, since they are asked: "Do you pledge your faith for the same?" 7. Whoever stipulates for something which consists in doing or refraining from doing something is thought to stipulate for something uncertain, as regards doing, for example, "the digging of a ditch," "building a house," "the delivery of vacant possession," as regards refraining, "that you should not prevent my crossing your field on foot or with cattle," "that you should not prevent my possessing the slave Eros." 8. Where one stipulates for this or that, as, for example, "ten or the slave Stichus," it may properly be asked whether this produces a certain or an uncertain obligation. For the things mentioned are certain, but it is uncertain which is to be provided. However, someone who reserves the choice to himself by adding the words "whichever I choose" can be taken to have stipulated for something certain since he can sue for the delivery of either the ten alone or the slave alone; whoever does not reserve the choice to himself stipulates for an uncertain thing. 9. Whoever stipulates for the principal and interest, if any, is thought to stipulate both for a certain and for an uncertain thing, and there are as many stipulations as there are several objects. 10. This stipulation "the delivery of the Tusculan estate" is demonstrably certain, and it is a term that ownership is to be completely conveyed to the stipulator to the fullest extent possible.

76 PAUL, *Edict, book 18:* If I stipulated for "this or that, whichever I shall choose," the

choice is a personal one and binds a slave or a son. However, the obligation can descend to the heirs even before the election on the death of the stipulator. 1. When we stipulate for "whatever you ought to deliver," everything owed up to the moment of stipulating is brought into account, but not (as in judicial proceedings) future debts, and so in a stipulation "what will be owed" or "both now and in the future" are added. This is because whoever stipulates for "whatever you ought to owe" declares on that sum which is already owing, whereas if he wishes to claim the whole amount, the words "or will be owing" or indeed "now and in the future" must be said.

77 PAUL, *Edict, book 58:* Where money is promised on a certain day under penalty, the penalty is due even where the promisor dies before the day, although the inheritance is not yet accepted.

78 PAUL, *Edict, book 62:* If a son-in-power who stipulated subject to a condition were emancipated and then the condition was satisfied, his father can bring an action, because in stipulations we look to the moment when the contract is made. 1. When I stipulate for an estate, this does not include the fruits which existed at the time of the stipulation.

79 ULPIAN, *Edict, book 70:* If security were taken from a procurator who was present, no one doubts but that the principal can sue in an *actio utilis.*

80 ULPIAN, *Edict, book 74:* Whenever there is an ambiguous phrase in a stipulation, the most convenient interpretation which preserves the object to be sued for is to be taken.

81 ULPIAN, *Edict, book 77:* Whenever someone promises to produce another, for example, either his slave or a freeman, without adding a penalty, it is a question whether the stipulation has any effect. And Celsus says that although the words "and if he is not produced a penalty will be paid" are not contained in this stipulation, yet it covers the interest had in his being produced. What Celsus says is true; for whoever promises to produce another promises to act so that he is produced. 1. If a procurator stipulate for someone's production without a penalty, it can be argued that it is not his but his principal's benefit which is involved, this is all the more so if the stipulation of the procurator was in the form "for whatever the matter is worth."

82 ULPIAN, *Edict, book 78:* No one can validly stipulate for his own property, but he can stipulate for its value. Of course, I can properly stipulate for the return of my property. 1. If the slave died after the promisor had delayed, nevertheless, he is liable as if the slave had survived. 2. One is taken to have delayed who preferred to litigate rather than to deliver.

83 PAUL, *Edict, book 72:* A contract is made between stipulator and promisor. So one promising for something to be given or done on behalf of another does not bind him; for each must promise for himself. Whoever promises that "fraud is and will be absent" does not simply promise its absence but undertakes to ensure the absence of fraud. Similarly, in this stipulation "to allow to possess" and again, "that neither you nor your heir should prevent its happening." 1. If Stichus is asked for, I thinking of one, you of another, nothing is accomplished. This Aristo thought applied also in lawsuits, but the view is preferred that the person intended by the plaintiff is taken to be asked for. For whereas a stipulation is valid because both consent, a lawsuit lies even against an unwilling defendant, and so the plaintiff is rather to be believed. Otherwise, a defendant would always deny that he had consented. 2. If on my stipulating for either Stichus or Pamphilus you promised to give one of them, it is agreed that you are not liable nor is the question answered. 3. It is different with amounts, as "do you promise to give ten or twenty"; for, although you promised ten, this is a good reply because with amounts the lesser is always understood to be promised. 4. Again, if I stipulate for several things, for example, Stichus and Pamphilus, if you promise one you will be liable; for you are taken to have replied to one of two stipulations. 5. I will stipulate without effect for sacred or religious objects or for public utilities left in perpetuity, (for example, a forum or basilica) or for a free person; although sacred objects can be

secularized and public utilities restored to private purposes and a freeman become a slave. For when someone promises a secular object or the slave Stichus, the promise is released if without his help the object becomes sacred or Stichus acquired his liberty; nor will the obligation be revived if again, by operation of law, the sacred object become profane or Stichus from freedom is reduced to slavery. For one and the same reason exists for both, for being released and being bound, because either it is possible to deliver or not. If an owner took a ship, which he had promised, apart and remade it from the same planks, because this would be the same ship, the obligation would be revived. For this reason Pedius writes that it is possible to hold as follows: If I stipulated for a hundred jars of wine, I ought to wait until it is produced; if, when produced, it is consumed without the promisor's fault, I ought to wait again until more can be produced and this delivered, and by these events the stipulation will either be avoided or validated. But these cases are different; for, indeed, when a freeman is promised, the possibility of his becoming a slave is not in mind; for a stipulation in this form concerning a freeman, "do you promise to deliver him when he becomes a slave," would not be valid nor "to convey that plot of land when it ceases to be sacred or religious and becomes secular," because the obligation cannot take effect immediately and only those matters which are possible can be the subject of obligations. But we stipulate not for the particular wine but generically and a tacit temporal element is presumed; but a freeman is a particular object. To await the chance of bad luck falling on a freeman is neither civil nor natural; for we properly deal with objects which can at once be put to use and under our ownership. And as for the ship, if it is dismantled with the intention that the planks should be put to another use, then, although it is remade due to a change of mind, the first ship has been destroyed and this one must be regarded as a different one. But if the planks are all refixed in order to rebuild the ship, it is not yet considered to be destroyed, and it remains the same ship on its reconstruction. In the same way timbers removed from a house with the intention that they be replaced are part of the house, but if they are taken to a vacant plot, although the same material be returned, it will be different. It is a question whether this applies also to praetorian stipulations where security is taken for the restoration of an object and whether it be the same object. 6. If something for which I stipulated gratuitously becomes mine gratuitously, the stipulation becomes void. And if I as heir succeed the principal, the stipulation is annulled. However, if the principal on his death bequeathed the obligation to me by way of legacy from the heir, I can sue on the stipulation. This is true even if the legacy is subject to condition because, even if the debtor himself had delivered the object bequeathed conditionally, he would not be released. But if it remained on the failure of the condition, the claim becomes void. 7. If I stipulate for Stichus, when he is dead, Sabinus says that my stipulation is actionable if the dead man could be the subject of some claim, for example, against a thief. In any other circumstances, however, the claim is invalid, since, even if he were owed, the promisor would be released by his death. The same also applies if I stipulate for a dead person after a delay. 8. If someone promised to produce a pregnant slave-girl somewhere, then, although he produced her without the child, he is taken to produce on this account.

84 PAUL, *Edict, book 74:* If I stipulated for the construction of a block of flats and time passed in which you could have done it, so long as I have not joined issue, it is assumed that you can discharge yourself by doing it. But if I have already joined issue, building it is of no help to you.

85 PAUL, *Edict, book 75:* It should be known that there are four ways in which an obligation can be performed. For there is sometimes a type for which we can sue severally among separate heirs; another which must be sued for whole and which cannot be claimed in part; another which can be sued for in part but which cannot be discharged except in the whole; another which can be sued for as a whole but can be discharged severally. 1. To the first type belong promises of fixed sums of money where both

claim and payment take account of the division of the inheritance. 2. To the second belongs any task which the testator ought to have had carried out. The several heirs are liable each for the whole because the completion of the work cannot be divided into portions. 3. But if I stipulated that "neither you nor your heirs should prevent my suing for it; if anything be done to the contrary, do you promise to pay so much," and one of several heirs of the promisor prevents me, in the view of better judges all are liable for that one person's act, because, although I am prevented by one only, I am not just prevented as to part. However, the others can make good their loss in an action for the division of the inheritance. 4. I can sue for part, although it is not possible to perform less than the whole, when I stipulate for an unspecified slave. A claim to him can be divided, but he can only be handed over whole. It is otherwise with several slaves; for they can be handed over separately. What the deceased could not do I cannot sue for on stipulation. The law is the same whether the promise were for ten thousand or a slave. 5. The whole can be sued for, but discharge of part brings release when we claim on the basis of eviction. The vendor's heirs are summoned to answer for the whole, and all must make a defense, and all will be liable on behalf of a defaulter; but liability is laid on each in respect of his share in the inheritance. 6. Again, if a stipulation be made as follows, "if the Titian estate is not conveyed do you promise to pay a hundred," unless the complete estate is conveyed, the hundred penalty is due, and it does not matter that all but one parcel is handed over, any more than it helps to redeem a pledge to pay the creditor in part. 7. Whoever, while obliged conditionally, took steps to see that the condition would not be fulfilled is nonetheless bound.

86 ULPIAN, *Edict, book 79:* The saying that there are as many stipulations as objects applies only where the objects are defined in the stipulation; if they are not so defined, the stipulation is single.

87 PAUL, *Edict, book 75:* No one can validly stipulate for his own future property in the event that it does become his.

88 PAUL, *Plautius, book 6:* Delay on the debtor's part can also be disadvantageous to the guarantor. But if the guarantor offered the slave and the debtor delayed, the guarantor is relieved by the slave Stichus's death. But if the guarantor killed the slave, the debtor is released, and the guarantor can be sued on the stipulation.

89 PAUL, *Plautius, book 9:* If after three years I took a stipulation from a tenant to whom I had leased an estate for five years for "whatever ought to be done or paid," no more is included in the stipulation than that which he ought already to pay; for the subject matter of the stipulation is what he already ought to pay. If, however, the words "or will be owed" are added, future obligations are included.

90 POMPONIUS, *From Plautius, book 3:* When we take a stipulation for a legitimate rate of interest in monthly installments, if the principal is not paid, although the obligation to pay the principal be brought to court, yet the penalty continues to accrue because the money is not in fact yet paid.

91 PAUL, *Plautius, book 17:* If I stipulated for a slave and, before any question of delay arose, the slave died, if indeed the promisor killed him, the stipulation is actionable. But if, however, he neglects him when ill, the question of the promisor's liability depends upon whether, as in the case of a *vindicatio* for the slave, the possessor is liable on the ground of negligence if he neglected him, as also should be one who promised delivery, or whether negligence in the case of a stipulation should be limited to commission and not omission. And this is the better view because one who promised to deliver is liable for giving not for doing. 1. However, if something be indeed in human use but unable to be delivered, such as an object dedicated as religious or sacred

or a slave who is manumitted, or even captured by the enemy, liability is apportioned in this way. If it was the property of the promisor himself either at the time of the stipulation or afterward and something happened to it, nevertheless, he will be liable; and it is the same if something happened to it through another after he had transferred it. But if it was another's and whatever happened was caused by another, he is not liable because he has done nothing, unless something of this sort happened after delivery was delayed. Julian also adopts this distinction. Again, if a slave which was the promisor's were removed from him, because he was a *statuliber*, he is to be regarded as one who had promised another's slave, because he ceases to be his without his act. 2. This raises the question whether one who killed, unaware that he owed, is also liable. Julian thinks this true of one who manumitted when he did not know that he was requested in codicils to hand over the inheritance. 3. It remains to consider what the old jurists laid down about the extent to which an obligation is understood to become perpetual whenever a debtor is negligent. Indeed, if the promisor so acted that he could the less easily pay, this provision is taken to be applicable; but if payment is only delayed, it is uncertain whether the former delay is purged if he subsequently ceased to be dilatory. Celsus the Younger writes that one who was dilatory in handing over Stichus whom he had promised could rectify the delay by a subsequent tender. This is a matter of what is right and equitable in which type of case, he says, one is often sadly misled by the influence of a knowledge of the law. Clearly, this view is preferable, and indeed Julian also adopts it. For when it is a question of damages and the position of each is equal, is not he better placed who is defendant than he who sues? 4. Now we must see to whom this provision extends. The inquiry is a double one; for we first ask who can make obligations perpetual and then whom they make liable for it. In any case, the debtor of the principal sum can perpetuate the obligation; it is doubtful whether additional debtors can. Pomponius thinks they can; for why should a guarantor be able to extinguish his obligation by his own act? And his opinion is correct, and so the obligation is perpetuated as regards himself and his successors. They can also perpetuate the obligation for their own additional debtors, that is, guarantors, because they promised the whole amount. 5. We must consider whether a son-in-power, who promises at his father's direction, imposes an obligation on his father by killing the [promised] slave. Pomponius thinks that he does, doubtless regarding the person who gives the order as an additional debtor. 6. The result of the provision is as follows: that the slave can still be sued for, but it is also taken to be possible to offer a formal release and to take a guarantor for the obligation. Whether it is possible to novate the obligation is doubted because we cannot stipulate for the nonexistent slave nor for the money which is not owed. I think novation is possible if it is arranged between the original parties; and this is Julian's view too.

92 PAUL, *Plautius, book 18:* If I stipulate as follows, "that you should do nothing to prevent me or my heir's gathering the vintage," this gives my heir an action.

93 PAUL, *Vitellius, book 3:* If I stipulated in this way, "that you should do nothing to prevent my acquiring a slave from among those you own," the choice will be mine.

94 MARCELLUS, *Digest, book 3:* Someone stipulated for the delivery of corn; this is a question of fact not of law. Therefore, if he had in mind certain corn, that is, of a certain quality and a certain quantity, this is taken to be expressed. But if he did nothing, wishing to choose the quality and measure, nothing, not even a single peck, seems to be stipulated for.

95 MARCELLUS, *Digest, book 5:* Someone who stipulated for the building of a block of flats immediately acquires an obligation, if it is clear where he wishes the flats to be built, so long as he has an interest in their being built there.

96 MARCELLUS, *Digest, book 12:* Someone who owed me a slave on a stipulation, detecting him in some wrongdoing, would kill him with impunity; nor will an *actio utilis* lie against him.

97 CELSUS, *Digest, book 26:* If I stipulated as follows, "will you appear; if you do not appear, will you deliver a heffalump," it is as if I had just stipulated; "will you appear?" 1. I can properly stipulate from you as follows: "Will you pay on Titius's behalf?" And this is not the same as "Titius is to give"; but on this stipulation I can sue for the extent of my interest, and therefore, if Titius be rich, I cannot sue for anything on this stipulation; for what can be my interest in your doing something which, if not done, would leave my money equally secure? 2. "If I become your wife, do you promise ten?" I think after examination an action should be refused, but commonly there is good ground for such a stipulation. So if a man similarly stipulate something other than a dowry from a woman.

98 MARCELLUS, *Digest, book 20:* I think I can stipulate conditionally for what is mine, for example, I can stipulate for a right of way to a property, although at the time the property is not mine; for if this were not true and I stipulate conditionally for another's property and it becomes mine gratuitously, the stipulation becomes void forthwith; and if the owner stipulated conditionally for a right of way, as soon as the land was alienated, the stipulation would immediately be of no effect, and this is indeed the case in the opinion of those who think that even that which they can rightly sue for is released when they come to a position in which they cannot sue. 1. On this stipulation "do you promise to shore up a block of flats," it is a question when the action arises. One certainly does not have to wait until it falls down; for the stipulator's interest lies in its being rather propped up than not. However, the action is ineffective if insufficient time has elapsed in which the contractor could have shored it up.

99 CELSUS, *Digest, book 38:* Whatever would make an obligation more burdensome is assumed to be omitted unless it is express, and we usually construe in favor of the promisor, because the stipulator was free to choose his words at large. Nor, furthermore, is the promisor to be entered up as a debtor, if it would be in his interests rather to be sued for certain goods, for example, vases or slaves. 1. If I stipulated in this form, "do you promise to pay if within two years you have not climbed the Capitol," I cannot properly sue until the two years have elapsed. For although the words are ambiguous, they are understood in the sense that it were irremediably true that you had not climbed the Capitol.

100 MODESTINUS, *Rules, book 8:* A condition which refers to the past and not merely to the present either destroys the obligation or has no delaying effect.

101 MODESTINUS, *Prescription, book 4:* Persons over the age of puberty can be bound by a stipulation without the consent of their curators.

102 MODESTINUS, *Replies, book 5:* Sellers gave the buyer to the extent of his interest a guarantee by stipulation against eviction. They promised the buyer as stipulator that they would be responsible, in particular, for his costs, if a lawsuit were raised. On the buyer's death, one of the sellers began an action against his heirs, alleging that he was owed the price. The heirs proved that the price had been paid, and sued on the stipulation for the costs of their defense. Modestinus gave an opinion that if the seller's promise was to pay the costs of an action relating to the ownership of the subject matter, no claim on stipulation lay for costs incurred when one of the sellers claimed the price, which had already been paid.

103 MODESTINUS, *Encyclopaedia, book 5:* A freeman cannot be the subject of a stipulation, because it cannot be alleged that he should be conveyed, nor can his value be paid over, any more than if one were to stipulate for a dead man or for enemy land.

104 JAVOLENUS, *From Cassius, book 11:* A slave promised money for his freedom and provided a freeman as guarantor. Although the slave was freed by someone other than the promisee, the guarantor is properly held liable. The question is not who freed him but whether he was in fact freed.

105 JAVOLENUS, *Letters, book 2:* I stipulated for Dama or Eros, slaves, to be conveyed. You offered Dama, and I delayed accepting him. Dama died. Do you think I have an action on stipulation? Modestinus replied: Following the view of Massurius Sabinus, I think you cannot sue on the stipulation. For he rightly argued that if the failure to perform was not due to delay on the part of the debtor, the latter was at once discharged.

106 JAVOLENUS, *Letters, book 6:* A person who stipulates for one of a number of farms bearing the same name, without specifying which, stipulates for an uncertain thing, that is, for whichever the promisor chooses to convey. The promisor's choice remains open up to the moment of conveyance.

107 JAVOLENUS, *Letters, book 8:* Do you regard this stipulation as immoral? A natural father instituted as heir his son, whom Titius had adopted, provided he was freed from the latter's parental power. The adoptive father was unwilling to emancipate the son unless he received a certain sum, and he stipulated from the natural father for this sum in the event of emancipation. After emancipation the son accepted the estate as heir. Now the adoptive father sues on the stipulation. [Javolenus] replied: "I do not think the stipulation is tainted by immorality, since the adoptive father would not otherwise have emancipated the son. Nor is the aim of the stipulator improper merely because he wanted to have something in order to be better cared for by the son after emancipation."

108 JAVOLENUS, *Letters, book 10:* I stipulated from Titius as follows: "If any woman marries me, do you promise ten by way of dowry?" Is such a stipulation valid? [Javolenus] replied: If I stipulate for a dowry in the form, "Whatever wife I marry, do you promise ten by way of dowry," nothing in the circumstances prevents the money being owed if the condition is fulfilled. A condition which depends on the act of an undetermined person can create an obligation, for example, "do you promise ten if someone climbs the Capitol" or "if someone sues me for ten, do you promise that amount." There is no reason why the same reply should not be given when dowry is promised. 1. No promise can be valid if it lies wholly within the choice of the promisor.

109 POMPONIUS, *Quintus Mucius, book 3:* If I stipulate, "Will you pay ten or fifteen," ten are due. If thus, "after one or two years," the money is due after two. Stipulations are construed as relating to the lesser amount or the longer term.

110 POMPONIUS, *Quintus Mucius, book 4:* If I stipulate for ten for myself and Titius, and I am not in the power of Titius, I am owed only five, not ten. The third person's portion is deducted, so that my invalid stipulation for the outsider does not increase my part. 1. If I stipulate from you, "do you promise to transfer any women's clothes of yours," one must look to the stipulator's rather than the promisor's intention and ask what the clothes really are, not what the promisor had in mind. Hence, if the promisor is used to wearing some womanly garment, it is nevertheless included.

111 POMPONIUS, *Quintus Mucius, book 5:* If I stipulate that "you should not prevent me using that house," does the stipulation take effect if you prevent not me but my wife? And what if my wife makes the stipulation and you prevent me? A broad construction is adopted to cover such facts. Likewise, if I stipulate that "you will not prevent my using a roadway in person or with cattle" and you prevent not me, but someone else from passing on my behalf, the stipulation will take effect.

112 POMPONIUS, *Quintus Mucius, book 15:* If someone stipulates for whichever of Stichus and Pamphilus he wishes, makes his choice, and sues, the chosen slave is the sole object of the obligation. But can he change his mind and sue for the other? This

depends on the wording of the stipulation. Does it say: "whichever I choose," or "whichever I want?" If it runs, "whichever I choose," and he makes his choice, he cannot then change his mind. But if the words import a later moment of time and run, "whichever I want," he can change his mind until such time as he formally dictates his claim in the action. 1. If someone stipulates as follows, "will you give security for one hundred aurei," and a guarantor is given for that amount, Proculus says that in a stipulation for security, the creditor's interest determines the content. Sometimes it covers the whole capital sum, for example, if the debtor is not good for the debt at all; sometimes less, if the debtor is good for part of the debt; and sometimes nothing, if he is so well off that we have no interest in obtaining security from him, though a debtor's soundness is generally estimated not merely from his assets but his character.

113 PROCULUS, *Letters, book 2:* "I stipulated, Proculus, for a penalty if building work was not finished according to my wishes before the first of June. I extended the date. Do you think I can truly say that the work was not done according to my wishes before the first of June, when I chose to fix a later date for its completion?" Proculus replied: A distinction is to be drawn. Not without reason, it makes a difference whether it was delay on the part of the promisor that prevented the work being finished by the first of June, as provided in the stipulation, or whether, when it was already too late to complete the work by the first of June, the stipulator postponed the date to the first of August. If the latter, I think the penalty is due, and it is irrelevant that there was a period before the first of June when the stipulator did not demand completion by the first of June, that is, did not wish the impossible. If this is wrong, the penalty would not be due even if the stipulator died on the thirty-first of May, because a dead man cannot wish anything, and there was some time left after his death to complete the work. 1. A seller promised the buyer that sureties would be given and that the property sold would be freed from burdens. The buyer now demands that it be freed, and the promisor is guilty of delay. What is the law? Proculus replied: The amount due in the action is measured by the interest of the plaintiff.

114 ULPIAN, *Sabinus, book 17:* If I stipulate for land to be made over on a given date, and, through the promisor's fault, it is not made over on that date, I can recover the amount of my interest in prompt performance of the promise.

115 PAPINIAN, *Questions, book 2:* I stipulated as follows: "Do you promise to appear at a certain place, and if you do not appear, to pay fifty aurei?" If the date is by mistake omitted from the stipulation, when the intention was that you should appear on a given date, the stipulation is defective. It is as if I stipulated for something designated by weight, number, or measure without specifying the weight, number, or measure; or for a block to be built, without mentioning the site; or for a farm to be conveyed, without mentioning the name. But if the initial intention was that you should appear on any day and, if you did not, pay money, this, like any stipulation framed subject to a condition, will be valid but will not take effect until it is shown to be no longer possible for the promisor to appear. 1. If I stipulate as follows, "if you do not climb the Capitol" or "do not go to Alexandria, do you promise that one hundred will be paid," the stipulation does not take effect at once, though you could have climbed the Capitol or gone to Alexandria, but only when it becomes certain that you cannot climb it or go there. 2. Again, if someone stipulates as follows, "if you do not convey Pamphilus, do you promise that one hundred will be paid," Pegasus gave an opinion that the stipulation took effect only when it was no longer possible for Pamphilus to be conveyed. But Sabinus held the view, based on the intentions of the parties, that once the slave could be conveyed, an action could be brought on the stipulation at once, and was postponed

only so long as failure to convey was not the fault of the promisor. He relied on the analogy of a legacy of provisions. For Mucius wrote that if an heir could hand over the provisions bequeathed and did not, he was at once liable for the sum of money mentioned in the legacy. This is accepted, as a matter of convenience, in view of the intention of the deceased and the nature of the subject matter. The view of Sabinus can therefore be accepted, provided the stipulation is framed not conditionally, for example, "if you do not convey Pamphilus, do you promise to pay one hundred," but as follows, "do you promise that Pamphilus will be conveyed; if not, that such-and-such an amount will be paid." This is undoubtedly the true position if the proved intention was that if the slave was not conveyed, both slave and money should be owing. But even if the wording is such that on failure to transfer the slave, only the money is owing, the same solution can be defended, because the proved wish was that either the slave should be transferred or the money claimed.

116 PAPINIAN, *Questions, book 4:* If you stipulate for ten from Titius and later stipulate from Maevius for whatever you cannot recover from Titius, Maevius is undoubtedly at risk for the whole amount. Even if you sue Titius for ten, Maevius is not discharged unless Titius satisfies the judgment. PAUL notes: Maevius and Titius are not bound jointly for the same obligation. Maevius is conditionally bound if recovery from Titius is impossible. Hence, suit against Titius does not discharge Maevius, whose liability remains undetermined, and payment by Titius does not discharge Maevius either, since Maevius was not liable, the condition of the stipulation not being fulfilled. Pending this, Maevius could not properly be sued. Indeed, suit could not be brought against Maevius while Titius was alive.

117 PAPINIAN, *Questions, book 12:* If I stipulate for one hundred slaves to be chosen by me or my heir and before I choose, I leave two heirs, the stipulation is divided numerically. It is different if the heirs succeeded after the slaves are chosen.

118 PAPINIAN, *Questions, book 27:* If I stipulate from a freeman who is treated in good faith as my slave, the stipulation is in almost all cases valid, even though the promise relates to my assets. What reason can be given for not holding a freeman bound? It does not follow that if he stipulates from me in regard to the same assets, I am bound. How is he going to have an action against me, when I acquire anything that he stipulates from a third party? From this aspect, he can be compared to a slave subject to a usufruct or to the slave of another who is treated in good faith as one's own. And if such a slave makes a promise to the usufructuary relating to the property of the latter, or to a buyer, respectively, no action on the *peculium* lies against the true owner, because in these cases the usufructuary or seller is treated as the owner. 1. "Do you promise that ten will be paid today?" I said that the money could be claimed on that very day. It is not premature to bring an action before the day finishes, as it would be in other legal contexts when time is in issue, and where suit should not be brought within the period within which payment can be made. But in the case proposed, the day was mentioned not to delay the suit but as a means of referring to the present moment. 2. "Do you promise to pay ten to me or Titius, whichever I wish?" The stipulation is for a fixed amount as regards what I am owed, but indeterminate as regards him. Thus, suppose I had an interest in payment to Titius rather than myself, because I had promised a penalty if payment was not made to Titius?

119 PAPINIAN, *Questions, book 36:* The fraud clause which is inserted in stipulations does not apply to those parts of the stipulation which contain more specific provisions.

120 PAPINIAN, *Questions, book 37:* If I stipulate thus, "do you promise to pay this sum of one hundred pounds," then, even if the addition "provided it in fact amounts to one hundred pounds" is well understood, it does not constitute a condition, since, if the money does not amount to one hundred the stipulation is void. It is accepted that words referring to the present rather than the future are not to be treated on all fours with a condition, even if the contracting parties were unaware of the truth.

121 PAPINIAN, *Replies, book 11:* On a clause running that "fraud is and will be absent in

relation to the matter of this promise, so-and-so stipulates and so-and-so promises," the action will be for an indeterminate claim. 1. In order to create an effective stipulation, a woman, who was about to marry a man, stipulated two hundred from him, if he should resume cohabitation with his concubine during the marriage. I gave an opinion that there was no reason why, if the condition was fulfilled, the woman should not sue on the stipulation, since the promise was based on sound morals. 2. "Do you promise payment when you die?" If the promisor is then deported to an island, the stipulation only takes effect when he dies. 3. A stipulation against fraudulent conduct by the debtor binds his heir, as is true of other contracts, like mandate and deposit.

122 SCAEVOLA, *Digest, book 28:* A borrower who had taken a loan at Rome promised the lender by stipulation to repay it in a distant province three months later. A few days later he informed the creditor before witnesses that he was prepared to pay the money in Rome after deduction of the amount he had given the creditor by way of interest. Since he offered the whole amount for which he was bound by stipulation, could the whole still be claimed in due course at the place at which payment was promised? Scaevola replied that the stipulator, on the day appointed, could sue at that place. 1. Callimachus took a transmarine loan from Stichus, the slave of Seius, at Berytus in the province of Syria, for a voyage to Brentesium. The loan was for the full two hundred days of the voyage with security by way of *pignus* and *hypotheca* over the cargo bought at Berytus for transport to Brentesium and that which he would buy at Brentesium for transport by sea to Berytus. It was agreed by the parties that when Callimachus reached Brentesium, he should, before the thirteenth of September next, himself take ship for Syria with other cargo purchased and put on board or, if by the said date he did not buy the cargo or set sail from that *civitas*, he would repay the whole amount at once, as if the voyage had ended, and pay all costs of those persons who recovered the money and took it to the city of Rome. Stichus, the slave of Lucius Titius, stipulated for the aforementioned payments and acts and Callimachus promised them. Pursuant to the agreement the cargo was placed on board, along with Eros, the fellow slave of Stichus, and the ship sailed for Syria before the thirteenth of September. If Callimachus, having duly loaded the cargo, remained behind, when he was already bound to pay the money over at Brentesium to be taken to Rome, and the ship sank, can he rely on the agreement of Eros, who was sent with him and who had no further permission or authority as regards the money, after the date of the agreement, than to receive it and take it to Rome? Nevertheless, is Callimachus liable to the owner of Stichus in an action on stipulation? Scaevola replied that on the facts stated he was liable. Again if, with the consent of Eros, Callimachus set sail after the prescribed date, could the act of Eros lose his owner the action already acquired? Scaevola replied that it could not. If, however, the slave had discretion to allow repayment of the money at whatever time or place, there would be a defense. 2. Flavius Hermes made a gift of the slave Stichus for the purpose of manumission and stipulated

thus: "If Stichus, the slave in issue, whom I have conveyed to you today by way of gift and for manumission, is, without fraud on my part, not manumitted and freed from power by you or your heir, Flavius Hermes stipulates for and Claudius promises a penalty of fifty." Can Flavius Hermes sue Claudius in regard to the freeing of Stichus? Scaevola replied that there was nothing in the facts to prevent it. Again, if the heir of Flavius Hermes wishes to sue the heir of Claudius for the penalty, can the latter free Stichus and so avoid the penalty? Scaevola replied that he could. Again, if the heir of Flavius Hermes is not willing to sue the heir of Claudius, is the heir of Claudius nevertheless bound to grant Stichus his freedom under the agreement, evidenced by the above stipulation, between Hermes and Claudius? Scaevola replied that he was so bound. 3. Joint heirs divided the land inherited but left one parcel in common on terms that if any co-heir wished to alienate his part, he should sell it to his co-heir or the latter's successor for one hundred twenty-five. If anyone contravened this, they reciprocally stipulated a penalty of one hundred. A woman co-heir repeatedly called on the tutors of her co-heir's children before witnesses, requiring them to buy or sell according to the agreement, which they failed to do. If she then sells to a stranger, can the penalty of one hundred be claimed from her? Scaevola replied that on the facts the defense of fraud would defeat the claim. 4. Agerius, a son-in-power, promised the slave of Publius Maevius by stipulation to pay whatever it was settled that his father owed Publius Maevius. On his father's death and before a settlement was reached on the debt owing and its amount, an action was brought against the father's heir or other successor and the amount of the debt was in that way fixed. Was Agerius bound by this? Scaevola replied that if the condition was not fulfilled, the stipulation did not take effect. 5. Seia, the heir of one tutor, reached a *transactio* in the form of a mere pact with the heir of the *pupilla*. She paid most of the agreed amount and gave a promise by stipulation for the rest. The heir, however, at once denounced the *transactio* and sued before the judge with jurisdiction in matters of tutelage. He lost and appealed to the competent judge of appeal, but lost again. In view of the delay on the part of the heir of the *pupilla*, as a result of which the money stipulated for was not paid by the tutor's heir or ever claimed, is interest now due from the tutor's heir? Scaevola replied that if Seia continued to offer to pay the money due under the stipulation, no interest was legally due. 6. Two brothers divided an inheritance between themselves and reciprocally stipulated that they would do nothing contrary to the partition, and, if they did, promised one another a penalty. On the death of the one, the survivor sued his heirs for the inheritance, as being a *fideicommissum* left him by their father. Judgment went against him on the ground that this claim, too, was included in the agreed settlement. Is the penalty due? Scaevola replied that on the facts it was.

123 PAPINIAN, *Definitions, book 1:* If a stipulation is made for the commission of a shameful act or in respect of one already committed, it is void from the start.

124 PAPINIAN, *Definitions, book 2:* "Do you promise that a block will be built on that site within two years?" This stipulation does not take effect until two years are up, although the promisor has not built the block and the time remaining is insufficient for it to be built. A stipulation which from the start carried a fixed time limit is not altered by later events. The same is held as regards a stipulation to appear in court. This does not take effect before the date fixed, even when it is certain that not enough time is left to comply with it.

125 PAUL, *Questions, book 2:* When we stipulate for "whatever you ought to do or convey," the content of the stipulation is confined to what is presently owing. It refers to that alone.

126 PAUL, *Questions, book 3:* If I stipulate thus, "if Titius becomes consul, do you promise ten annually from this day," and the condition is fulfilled three years later, thirty can then be claimed. 1. Titius stipulated from Maevius both for a farm minus the usufruct and for the usufruct of the same farm. There are two stipulations, and the usufruct promised separately is something less than that which goes with the ownership. For if the promisor transferred the usufruct and the stipulator lost it through nonuse, the former is discharged by later delivering the farm minus the usufruct. It is different if someone promises the full ownership, transfers the usufruct, and, when the latter is lost, transfers the ownership minus the usufruct. The first promisor was discharged by transferring the usufruct, the second is not freed from any part of his obligation unless he makes the stipulator full owner. 2. "Chrysogonus, slave and steward of Flavius Candidus, has stated in a writing subscribed and sealed by my master that the latter has received from Julius Zosas, acting for Julius Quintillianus who is absent, one thousand denarii as a loan. Zosas, freedman and acting for Quintillianus, stipulated for and my owner Candidus promised that this sum will be paid on the first of November next to Quintillianus or his heir, whoever it may concern. If satisfaction is not given on that date, Julius Zosas stipulated and Flavius Candidus my owner promised eight denarii by way of interest." The slave's owner subscribed the document. I gave the following opinion: We can acquire no obligation through a free person who is neither in our power nor treated by us in good faith as our slave. Of course, if a freeman lends money, his own or ours, in our name on terms that payment is to be made to us, we acquire the obligation on the loan. But what the freedman stipulated for in favor of his patron is invalid, and the mention of the patron, who acquired the principal obligation, does not even make him a proper payee. Furthermore, can the lender himself sue for the loan on the ground that the money was actually paid over? For when we lend money and also stipulate for it, there is only one obligation, that is to say, a verbal obligation. Of course, if the payment came first and the stipulation followed, the natural obligation should not be treated as abandoned. The second stipulation for interest without mention of the name does not suffer from the same defect (it would be perverse to insist that the interest is payable to the same person as the principal). Hence, the stipulation for interest in favor of the freedman is valid, and he is bound to assign it to the principal. Generally speaking, in stipulations one must look at the actual words in which the obligation is framed. It is rare for a time limit or condition to be implied from the circumstances. A person is never implied but must be expressly mentioned. 3. If I stipulate that you should appear and, if you do not, that something should be conveyed which it is impossible for the promisor to convey, the second stipulation falls away and the first remains valid. It is as if I had simply stipulated for you to appear.

127 SCAEVOLA, *Questions, book 5:* If a *pupillus* without his tutor's authority promises a slave Stichus and gives a surety, and if the slave dies after the *pupillus* is guilty of delay, the surety will not be liable for the delay of the *pupillus* either. It does not count as "delay" when no action lies. The point of the surety's obligation is that he can be sued during the slave's lifetime or, for delay on his own part, afterward.

128 PAUL, *Questions, book 10:* If two stipulate jointly, so that the stipulation of the one is valid, of the other invalid, the invalid stipulator cannot properly receive payment, because he is being paid in respect of his own, not the other's, obligation and his is invalid. Similarly, if there is a stipulation for Stichus or Pamphilus, which is valid as regards one, the other, who belonged to the creditor, cannot properly be given in payment, even if he should cease to belong to him. Both were mentioned as objects of the obligation, not of payment.

129 SCAEVOLA, *Questions, book 12:* If someone stipulates as follows, "do you give ten pounds if the ship arrives and Titius becomes consul," the sum is not due unless both happen. Conversely, "do you promise to pay if the ship does not arrive and Titius does

not become consul" requires that neither should happen. The formulation "if neither the ship arrives nor Titius becomes consul" is similar. But if it goes, "will you pay, if the ship comes or Titius becomes consul," one is enough. Conversely, "will you pay if the ship does not come or Titius does not become consul" is satisfied if one does not happen.

130 PAUL, *Questions, book 15:* The view that a father can stipulate in favor of his son-in-power, just as if the latter stipulated for himself, applies to legal rights which the father is capable of acquiring. If, however, the object of the promise is an act, for example, that the son can hold something or can pass across land himself or with cattle, the stipulation is void. On the other hand, a son-in-power who stipulates that his father can pass across land acquires a right for his father. Indeed, he can even acquire for his father a right which he could not acquire for himself.

131 SCAEVOLA, *Questions, book 13:* If I stipulate that "neither you nor your heir Titius will prevent my passing across land," Julian writes that not only Titius but his co-heirs are liable if they prevent me. 1. A person stipulates that land be conveyed to himself or Titius, and it is delivered to Titius. The stipulator can still sue for the land in order to secure a promise against eviction. He has an interest, since he can recover the land from Titius in an action on mandate. But if he mentioned Titius in order to make him a gift, the debtor will be released in full by the delivery to Titius.

132 PAUL, *Questions, book 15:* One who took charge of another man's son promised the person who handed him over a certain sum if he should treat him otherwise than as a son. Does the stipulation apply if the promisor later expels the son from home or dies leaving him nothing by will? What difference does it make whether the boy was the son or foster child or blood relation of the person suing? Further, does the stipulation apply if a person gives his son in adoption in legal form and, there being a stipulation as above, the adoptive father disinherits or emancipates the son? I replied: The stipulation is valid in both cases. So, if the agreement is broken, it takes effect. But, first, can the stipulation apply to one who adopts in legal form and then disinherits or emancipates? Fathers commonly do this to their sons, so the adopter did not treat him "otherwise than as a son." Hence, if disinherited, he should sue on the ground of an undutiful will. What if he deserved to be disinherited? Obviously, the emancipated son cannot resort to this remedy. Hence, the stipulation should have been framed so that the adopter promised something determinate if he emancipated or disinherited the boy. In that case, if the stipulation takes effect, one could ask whether the disinherited son should be allowed to complain that the will is undutiful. Especially, if he succeeds as heir to his natural father, should he, having failed in the complaint of an undutiful will, be denied the action on stipulation? But if the stipulator should not be denied the action because the son loses his claim, neither should the son himself be denied recovery of the money owed. As to the person who took charge of the son without adopting him, I do not see how to apply to him the words "treats him otherwise than as a son." Are we to require disinheritance or emancipation, terms which are inept in regard to such a stranger? And if the man who adopted in legal form did not violate the tenor of the stipulation by making use of his parental power in regard to the son, the man who has not so adopted is making a vacuous promise. Still, it can be said that the stipulation takes effect. 1. A son-in-power stipulated thus: "Do you guarantee the amount I shall lend Titius?" After emancipation he made the loan. The surety owes the father nothing, since the debtor is not bound to him either.

133 SCAEVOLA, *Questions, book 13:* If I stipulate thus, "do you promise that violence

will not occur through you or your heir," and sue, because you did me violence, the stipulation continues to apply to your heir's act. Indeed, the stipulation takes effect if there is subsequent force on the part of the promisor. It is not confined to one act of force. It extends to both him and his heir and to repeated acts on his part, so that judgment is given for the loss suffered. If on the other hand we take the stipulation "will not occur through you or your heir" as referring to the first act of violence alone, then, if the promisor uses force, the stipulation will not apply to the heir's conduct, and if suit is brought for the promisor's alleged force, the stipulation ceases to have effect, which is not the case.

134 PAUL, *Replies, book 15:* Titia, who had a son by another man, married Gaius Seius, who had a daughter. During the marriage, they agreed that the husband's daughter should be engaged to the wife's son. A deed was drawn up and a penalty attached in case either spouse impeded the marriage. Later Gaius Seius, still married to Titia, died. His daughter refused to marry. Are the heirs of Gaius Seius bound by the stipulation? Paul replied that the stipulation mentioned was contrary to sound morals, so that an action on it would be met by the defense of fraud. It is regarded as degrading for the bond of marriage, present or future, to be secured by a penalty. 1. He also gave an opinion to the effect that agreements mentioned in prefatory matter are taken to be repeated in the stipulation itself, though not so as to render the stipulation invalid. 2. He also gave an opinion that when Septicius promised in writing to pay money which was deposited with Sempronius, and interest at six percent, it must be taken, if the parties were present together, that the promise was preceded by words of stipulation on the part of Lucius Titius. 3. He also gave an opinion that when there are several heads of agreement and then a single stipulation is made to cover them all, although there is only one question and answer, each individual head of agreement is regarded as the object of a stipulation.

135 SCAEVOLA, *Replies, book 5:* If someone promises thus, "I will pay you ten on the day of demand and interest on it each thirty days," is interest due from the date of the stipulation or from the date on which repayment of the capital is claimed? Scaevola replied that on the facts stated, the interest was due from the date of the stipulation, unless a contrary intention was clearly proved. 1. Again, when do I have to repay the money "on demand?" He replied that on the facts stated, the period ran from the date of the stipulation. 2. Seia formally promised Lucius Titius, having bought gardens on his mandate, that on receipt by her from him of the whole price with interest, she would convey the ownership of the gardens to him. It was there and then agreed between them that the principal would pay the whole sum and take transfer of the gardens before the first of April. Lucius Titius did not pay the whole price with interest to Seia before the first of April. Shortly afterward, however, he was able and willing to pay the remainder to her with interest, but she refused to accept it. It has still, through no fault of Titius, not been paid. Can Lucius Titius, who is willing to pay the whole amount to Seia, sue on stipulation? Scaevola replied that if he made the offer shortly afterward and the woman suffered no loss through the delay, he could. All that is a matter for the judge's *cognitio.* 3. Titius recorded in writing that a slave had been given and transferred to him by Seia on terms that the slave should not come into the hands of Titius's brother, his son, his wife, or his mother-in-law. Seia stipulated for this and Titius promised it. Two years later Titius died leaving as heirs Seia and the brother into whose service the slave was expressly not to fall. Can Seia sue her brother and co-heir on stipulation? Scaevola replied that to the extent that she had an interest she could. 4. A daughter, who began proceedings for an undutiful will and compromised the suit, later entered into a stipulation with the heirs, which included a fraud clause, and then sued before the prefect for forgery of the will and failed to prove it. Can an action be brought on the fraud clause? I replied that the subsequent

proceedings had no bearing on the stipulation.

136 PAUL, *Views, book 5:* If one and the same object of a stipulation is called by different names, the fact that the parties use different words does not invalidate the stipulation. 1. If someone stipulates for a right of roadway to his land and then sells the land or part of it before the servitude is constituted, the stipulation ceases.

137 VENULEIUS, *Stipulations, book 1:* The acts of stipulator and promisor must be continuous, though a moment or two may naturally intervene. The reply must be made when the stipulator is at hand. If, after the question, something else is begun, the proceeding is invalid, even if the reply is given on the same day. 1. If I stipulate for a slave and am thinking of a different slave from you, the act is void, since a stipulation is complete only if both parties agree. 2. When I stipulate thus, "to be paid at Ephesus," time is implicitly allowed. How much is questioned. It is preferable to have recourse to the judge, as a good man, who will assess the time which the conscientious head of a household would need to do what is promised. Hence, one who has promised to pay at Ephesus is not bound to proceed by imperial post and continue his journey day and night, disregarding storms, nor must he travel with reprehensible self-indulgence, but with due regard for his age, sex, health, and period of travel, the aim being to arrive in good time, that is, at the time at which most persons in the same circumstances would arrive. Once that time has passed, though he is still in Rome and so cannot pay in Ephesus, nonetheless, he is properly subject to a *condictio*, either because it is his own fault that he has not paid at Ephesus or because payment at Ephesus could be made by another or because he can pay anywhere. Even money due at a later date can be paid, though not sued for, earlier. But if he proceeds by imperial post or a fortunate voyage brings him to Ephesus earlier than anyone else, he is bound to pay at once, since there is no room for conjecture when the actual time taken is established. 3. Similarly, one who promises that a block will be built need not hasten to collect craftsmen from all sides and employ numerous laborers, nor should he be satisfied with one or two. A mean must be set in accordance with the standard of a conscientious builder at that place and time. If the building is not begun, the assessment is confined to what could have been achieved in the period in question. If the building is constructed after the time at which the block should have been completed, the promisor is to be discharged, just as one who promises to convey is discharged if at any time he transfers the property. 4. Is one who promises that one hundred will be paid bound immediately, or is the obligation postponed until he can collect the money? Suppose he does not have it at home and cannot find a lender? The issue concerns not the existence of a natural obstacle but rather facility of payment. Facility of payment relates to personal convenience or inconvenience, not to the content of the promises. Otherwise, if someone promised that Stichus would be conveyed, we should have to inquire where Stichus was. Surely, it can make little difference whether someone promises to convey at Ephesus or promises when in Rome, to convey property which is in fact at Ephesus? This too relates to facility of payment, since it has in common with the case of the money and of Stichus that the promisor cannot here and now hand them over. In general, difficulty of performance is a burden on the promisor, not a bar to the stipulator. Otherwise, we might begin to say that one who promised to convey another's slave was not able to convey him if the owner refused to sell. 5. If I stipulate from someone who cannot perform, when another could, Sabinus writes that a valid legal obligation is created. 6. If someone stipulates subject to the condition that Titius sells sacred or religious property, a forum, a basilica, or something of that sort, given over to public use in perpetuity, either the condition cannot be fulfilled in law or Titius is not permitted to fulfill it. Hence, the stipulation will be invalid, just as

if a condition had been set, fulfillment of which is a natural impossibility. Nor does it matter that the law may change and that what is now impossible may become possible later. The validity of the stipulation depends on the present, not the future law. 7. If we stipulate for an act, Labeo says that it is a matter of usage and elegance to add a penalty, "if the act is not done as aforesaid." When we stipulate for an abstention the clause runs: "if the contrary is done." When we stipulate at one and the same time for acts and abstentions, it runs: "if you do not act as aforesaid, if you do the contrary." 8. Moveover, take note that when we stipulate for a conveyance, we cannot acquire for one heir alone, but necessarily for all. When, however, we stipulate for an act, a single person can properly be designated.

138 VENULEIUS, *Stipulations, book 4:* Sabinus says that one who stipulates to be paid at the time of a certain fair can sue on the first day of the fair. Proculus and the other writers of the opposite school say that no suit is possible so long as the fair is still open, even for a short time. I agree with Proculus. 1. When I have stipulated unconditionally for "this or that" to be conveyed, you can change your mind as often as you like as to which you will hand over. An expressed intention is not the same as a real intention.

139 VENULEIUS, *Stipulations, book 6:* When one makes a claim under the stipulation for double, the seller's heirs must all be sued for the whole amount, and all must defend the action. If one fails to defend, it does not avail the others to do so, because the sale, which is indivisible, must be defended as a whole. But whereas the failure of one to defend is taken as the failure of all, and so all are liable, each must pay according to his share of the inheritance.

140 PAUL, *Neratius, book 3:* After listing several items, a stipulation ran: "All the aforementioned will be conveyed." This is apt to create as many stipulations as items. 1. The old lawyers differed about the stipulation "the money is to be paid in one, two, and three years respectively." PAUL: But on the better view there are three stipulations for three amounts. 2. The accepted view, that an obligation ceases if it reaches a state from which it could not begin, is not always true. Thus, one co-owner cannot stipulate for a right of way for himself or with cattle or along a road to jointly owned land; but if a sole stipulator dies leaving two heirs, the stipulation remains valid. A servitude cannot be acquired through some only of the owners, but if acquired, it can be retained through some. This happens if part of the servient or dominant land comes into the ownership of the other owner.

141 GAIUS, *Verbal Obligations, book 2:* If a slave or son-in-power stipulates for "this or that, whichever I want," it is not for the owner or father but for the slave or son to make the choice. 1. If a stranger is referred to, for example, "whichever of them Titius chooses," the stipulator is not entitled to claim either unless Titius has chosen it. 2. Although a *pupillus* can properly stipulate from the time he can speak, he cannot be bound by a stipulation, if he is in his parent's power, even with his father's approval. A person who has reached the age of puberty, however, who is in power, is bound just like the head of a household. What has been said of a *pupillus* applies to a daughter-in-power who is not of the age of puberty. 3. If I stipulate for "me or Titius" and you promise to pay me, all are agreed that you have answered the question, since it is settled that I alone acquire the obligation, while Titius is merely a proper payee. 4. If a stipulation is made by parties at Rome thus, "do you promise to pay today at Carthage," in the view of some the stipulation does not necessarily depend on an impossibility. It may be that both stipulator and promisor have, some time before,

told their stewards that there would be a stipulation on that day, and the promisor has asked his steward to pay, the stipulator is to accept, the sum in question. If so, the stipulation can be valid. 5. When I stipulate for "me or Titius," it is said that different things cannot be specified for the two of us, for example, "ten for me or a slave for Titius." But if the thing specified is paid to Titius, although the promisor is not legally discharged, he can protect himself by a defense. 6. Different times can be specified, for example, "me on the first of January or Titius on the first of February." Indeed, an earlier date for Titius is possible, for example, "me on the first of February or Titius on the first of January." In the latter case the stipulation is construed thus: "If you do not pay Titius on the first of January, do you promise to pay me on the first of February?" 7. Again, I can stipulate for myself unconditionally or for Titius conditionally. But if it is for myself conditionally or for Titius unconditionally, the whole stipulation is invalid, unless the condition is fulfilled, because, unless the obligation has force as regards me, the addition is without force. This state of the law relates to the case in which it is clear that the added mention of Titius is unconditional. But if I stipulate, "if a ship comes from Africa, do you promise payment to me or Titius," the condition applies to the person of Titius as well. 8. From this it is clear that if two different conditions apply to me and Titius, and my condition is not fulfilled, the whole stipulation is ineffective; but if my condition is fulfilled and also that of Titius, payment can be made to Titius. If the condition of Titius is not fulfilled, it is as if his name had not been added. 9. From all this it follows that even when the third person's name is not properly added, the stipulation can take effect in the stipulator's own person.

2

A PLURALITY OF PARTIES

1 MODESTINUS, *Rules, book 2:* The party who stipulates is called the stipulator and the party who promises is called the promisor.

2 JAVOLENUS, *From Plautius, book 3:* When two persons have either promised or stipulated for the same sum of money, they are by operation of law bound or entitled severally for the full amount; and so the whole obligation is extinguished by a legal claim by, or a formal release of, one of them.

3 ULPIAN, *Sabinus, book 47:* In the case of two co-promisors, there is no need to fear a novation; for although one answers first and the other becomes bound later on, it is logical to say that the original obligation continues and the later one is accessory to it; and it does not matter if they make their promises at the same time or separately, since the arrangement between them is that they should both become liable as co-promisors, and there is no novation. 1. Where two persons have become liable as co-promisors, the whole amount can be claimed from one of them alone; for it is a case of two being liable in such a way that each is bound for the whole amount and it can be claimed from either of them. There is no doubt that one can claim a portion of the debt from each, just as we can claim from the party liable and from his verbal guarantor. Certainly, where there is a single obligation, there is a single sum due, and so if one pays it, all are freed, or if payment has been made by one, the result is the extinction of the other's liability.

4 POMPONIUS, *Sabinus, book 24:* Where the question put to two co-promisors is "do you promise" [plural], and they answer either "I promise" or "we promise," or where the question put to them is "do you promise" [singular], and they answer "we promise," they are properly bound.

5 JULIAN, *Digest, book 22:* Everyone knows that the work of third parties can be the subject of a promise and that a verbal guarantor can be attached to such an obligation. So there is nothing to prevent the making of two co-stipulators or co-promisors, as, for example, if two co-stipulators stipulated for the same work from the same workman; or, on the other hand, if two workmen in the same trade are recognized as promising the same work, then two co-promisors come into being.

6 JULIAN, *Digest, book 52:* If I, with a view to making two co-promisors, have put the question to each of them, but only has answered, I think the better view is that the one who answered is bound. For the question put to each of them was not subject to the condition that he would be bound only if the other answered as well. 1. I have no doubt that where there are two co-promisors, the stipulator is free to accept a verbal guarantor either from both of them or from one only. 2. But if the question was put to a party by two co-stipulators and he replied that he promised one of them, he is bound to that one only. 3. Two co-promisors can unquestionably be made on terms that the obligation should depend on the time within which each gave his answer. But a reasonable period, and likewise a reasonable amount of negotiation, so long as it does not run counter to the obligation, in no way prevents them being two co-promisors. Thus, if a verbal guarantor to whom the question has been put gives his answer between the answers of two co-promisors, he may be considered no obstacle to the obligation of the co-promisors, since no long period intervened and there was no transaction running counter to the obligation.

7 FLORENTINUS, *Institutes, book 8:* Where there are two co-promisors, one of them may be bound [unconditionally and the other] for a limited period or conditionally; for a time clause or a condition in respect of "B" will be no obstacle in the way of a claim against "A" who was bound unconditionally.

8 ULPIAN, *Replies, book 1:* Where the words used are "to you stipulating we have promised that such and such be due," it matters what the contracting parties have agreed. For if the two have been made co-promisors, one who was absent is not bound, whereas one who was present is liable for the full amount; if not, the latter will be liable only for his share.

9 PAPINIAN, *Questions, book 27:* I have deposited the same thing at the same time with two persons and have given credit to each of them for the full amount, or I have in like manner lent the same thing to two persons. They become liable as co-promisors, because this is the effect not only of a verbal stipulation but also of other contracts, such as sale, hire, deposit, loan, and of a will, as where the testator, having instituted several heirs, declares: "Let Titius and Maevius give ten to Sempronius." 1. But if, when someone makes a deposit with two persons, it is agreed that one of them should be liable additionally for negligence, the more correct view is that they are not liable as co-promisors since they have undertaken a varying obligation. The same result should not follow when both have promised additional liability for negligence and later that liability is by agreement lifted from one of them, since a subsequent agreement affecting one of the two cannot alter the nature and character of the obligation, which initially created two co-promisors. Wherefore, if they were partners and had a common liability for negligence, an agreement made with one would benefit the other. 2. If I made two co-promisors, but stipulated that a sum of money should be brought to Capua from different places, account will be taken of the appropriate time in the case of each debtor. For although they have undertaken an exactly equal obligation, nonetheless, the particular liability of each is determined individually.

10 PAPINIAN, *Questions, book 37:* If two co-promisors are not partners, it will be of no benefit to one that the stipulator owes money to the other.

11 PAPINIAN, *Replies, book 11:* It is agreed that it is not impractical to accept co-promisors who are verbal guarantors for each other. So the stipulator, if he wishes to divide his action (and he may not be compelled to divide), will be able to sue the same man for parts, one as principal debtor and the other as guarantor for the first, just as if he were suing two co-promisors by separate actions. 1. Where it was set out in a document that "'A' and 'B' have stipulated for one hundred," and it was not added, "so that they are co-stipulators," they were considered to have stipulated each for his individual share. 2. On the other hand, when it was found stated in a contract, "Julius Carpus has stipulated for so many aurei to be properly paid, and I Antoninus, Achilleus, and Cornelius Dius have promised it," they each owed their share, because it had not been added that they had promised as individuals to pay the full amount, so as to constitute them as co-promisors.

12 VENULEIUS, *Stipulations, book 2:* When there are two parties to promise, and one answers today and the other tomorrow, Proculus held that they are not co-promisors and the one who answered on the second day is not even considered bound, since the stipulator had gone over to other transactions or the promisor would have answered only after those matters had been carried out. 1. If I have stipulated for the same ten from Titius and from a *pupillus* without his tutor's authority, or from a slave, as if to constitute them co-promisors, Julian writes that Titius alone is bound, although, if the slave made the promise, the same practice ought to be followed in the action on the *peculium*, as if he had been free.

13 VENULEIUS, *Stipulations, book 3:* If a co-promisor has become heir to another co-promisor, it should be stated that he undertakes two obligations. For where there may be some difference in the obligations, as in the case of a verbal guarantor and the principal debtor, it is clear that one is extinguished by the other; but where they are both of the same character, there is no way of ascertaining why one should be extinguished rather than the other; so also if one co-stipulator becomes heir to the other, he is involved in two kinds of obligation.

14 PAUL, *Handbook, book 2:* There can be co-stipulators and co-promisors also in the case of praetorian stipulations.

15 GAIUS, *Verbal Obligations, book 2:* When I and Titius have stipulated for something which is regarded as belonging to a single individual, we cannot become co-stipulators, as when we stipulate for a usufruct or something by way of dowry to be handed over; and so Julian writes. He says that if Titius and Seius have stipulated for ten or Stichus, who belongs to Titius, they are not considered co-stipulators, since only ten are owed to Titius, but ten to Stichus or Seius. This opinion implies that if the debtor has paid either of them ten or has handed over Stichus to Seius, he still remains bound to the other. But it should be stated that if he has paid ten to one of them, he is freed from liability to the other.

16 GAIUS, *Verbal Obligations, book 3:* Once one of two co-stipulators has sued, an offer of payment by the promisor to the other is of no effect.

17 PAUL, *Plautius, book 8:* Atilicinus, Sabinus, and Cassius agreed that if the payment of a legacy has been imposed on certain designated heirs, or on all the heirs with a certain exception, they owe the whole legacy in proportion to their shares in the inheritance since it is the inheritance which binds them. It is the same when they are all designated heirs.

18 POMPONIUS, *From Plautius, book 5:* Where two co-promisors are bound in respect of one and the same Stichus, any act done by one also prejudices the other.

19 POMPONIUS, *Quintus Mucius, book 37:* Where two debtors owe the same sum of money and one of them is freed from the obligation by change of civil status, the other is not released. For it matters greatly whether the actual debt is paid or a debtor is released; when one debtor is released and the obligation continues, the other remains bound. Thus, if a debtor has been interdicted from fire and water, a verbal guarantor provided subsequently by him is liable.

3

THE STIPULATION OF SLAVES

1 JULIAN, *Digest, book 52:* When a slave stipulates, it does not matter whether he stipulates for payment to himself or his master, or indeed without the addition of either. 1. If your slave was acting as my slave in good faith and had a *peculium* which belonged to you, and I lend a sum of money from it to Titius, the coins will remain yours, and the slave's stipulation for that sum in my name is of no effect, so you can recover the money by *vindicatio.* 2. If a slave belonging to you and me in common has made a loan from his *peculium,* which belongs exclusively to you, he acquires the obligation for you, and even if he has stipulated for the same sum in my name, he will not release the debtor from his obligation to you. Each of us will have an action, I on the stipulation, and you because it is your money that has been paid over; however, the debtor will be able to defeat me with the defense of fraud. 3. When my slave stipulates for something to be delivered to my slave, that should be regarded as if he had stipulated for me. So when he stipulates for your slave, it is as if he has stipulated for you with the result that one stipulation produces an obligation whereas the other is of no effect. 4. A common slave bears the character of two slaves. For that reason, if my own slave has stipulated for a slave common to me and to you, the legal effect of this form of words will be the same as it would have been if two separate stipulations had been made: one in the name of my slave and the other in the name of yours; nor ought we to think that I acquire only a half share, and the other half goes to no one. For the character of a common slave is of such a nature that in a case where one of his masters can acquire and one cannot, he is considered as if he belonged only to the one for whom he has the capacity to acquire. 5. A slave subject to a usufruct has stipulated on behalf of the usufructuary or the owner. If this stipulation is in connection with the usufructuary's property, it is void, because [otherwise] the slave would have been able to acquire an action for both of them in connection with the property of the usufructuary. But if the stipulation is for something else, the owner can sue, and if the promisor has paid the usufructuary, he is released. 6. A slave common to Titius and Maevius has stipulated in these terms: "Do you promise to pay Titius ten on the first of the month? If you have not paid Titius ten on the first of the month, do you promise to pay Maevius twenty?" There appear to be two stipulations; however, if ten has not been paid on the first of the month, both masters may bring the action on the stipulation, but in regard to the second obligation owed to Maevius, Titius will be defeated by the defense of fraud.

2 ULPIAN, *Sabinus, book 4:* A common slave cannot stipulate for himself personally, although it is clear that he can stipulate for a master; for he does not acquire himself for the master, but rather through himself he acquires an obligation for him.

3 ULPIAN, *Sabinus, book 5:* If a slave of the state or a municipality or a colony stipulates, I think the stipulation is valid.

4 ULPIAN, *Sabinus, book 21:* If a common slave stipulates for himself and one of his masters, the effect is as if he stipulates for all his masters and one of them, for example, for Titius and Maevius and Titius; and probably Titius will be owed three quarters and Maevius one quarter.

5 ULPIAN, *Sabinus, book 48:* A common slave belongs to all his masters, not wholly to each of them as individuals but in undivided shares, so that they have notional rather than physical shares; thus, if he stipulates for something, or acquires something in some other way, he acquires it for all his masters in the proportions in which they own him. However, he may stipulate or have something delivered to him for a particular one of his masters, and then acquire for him alone. And if he does not stipulate expressly for a master but by the direction of one of his masters, we adopt the rule that he acquires exclusively for the master at whose direction he stipulated.

6 POMPONIUS, *Sabinus, book 26:* Ofilius used rightly to say that in the cases of receipt of something on delivery and of deposit and loan for use, there could be exclusive acquisition for the one who gave the direction; and this is said to be the view of Cassius and Sabinus too.

7 ULPIAN, *Sabinus, book 48:* Accordingly, if, say, he has four masters and he has stipulated at the direction of two of them, he will acquire only for those who directed him; and furthermore, the position is that he will not acquire the whole thing for them in equal shares but in proportion to their shares of ownership in him. I think the same applies also in the case where the stipulation is expressly for them; for if he has stipulated at the direction of all the masters or expressly for all of them, we would have no doubt that he acquires for them all according to their shares of ownership and not in equal shares. 1. If a common slave belonging to two partners has taken a stipulation from one of them expressly in favor of the other, the debt is owed to that one alone. If he has stipulated in an unqualified way without any addition, that slave will acquire all the shares, with the exception of the share belonging to the promisor, for the other partners. But if he has stipulated by the direction of one partner, the legal result is the same as if he had stipulated expressly for payment to that same partner. According to Julian, it may sometimes happen that he can acquire exclusively for one of his two masters, even though he has not stipulated at his direction or expressly for him, as when, say, he stipulates for something which cannot be acquired by both of them. For example, where he stipulated for a servitude in favor of the Cornelian land, which belonged to Sempronius, one of the masters, he acquires for him alone.

8 GAIUS, *Problems, sole book:* So also if one of the masters is about to marry, and a dowry is promised to that slave.

9 ULPIAN, *Sabinus, book 48:* So also if a slave belonging to Titius and Maevius has stipulated for delivery of a slave who belonged to Titius, he acquires only for the master to whom that slave did not belong. If he has stipulated for the conveyance of Stichus to himself or with the words, "do you promise that he be conveyed to Maevius and Titius," he acquires the whole for Maevius. For what he cannot acquire for one of his masters belongs to the one capable of accepting the obligation. 1. If a slave has two masters, and he stipulates for this or that one of his masters, it has been asked whether the stipulation is good. Cassius wrote that the stipulation is ineffective; Julian approves Cassius's opinion, and we adopt that rule.

10 JULIAN, *Digest, book 52:* If a stipulation has been taken in these terms, "do you promise to convey ten to Titius or the land to Maevius," since it is uncertain for which of them [the slave] has acquired the action, the stipulation is accordingly to be considered ineffective.

11 ULPIAN, *Sabinus, book 48:* If he has stipulated for himself or for Primus or Secundus, his masters, in this case also we should follow the view of Julian, that the stipulation is ineffective. But is it just the addition which is ineffective or the whole stipulation? I think the addition alone is ineffective; for when he says, "for me," he acquires the action on the stipulation for all his masters. Is it possible then for payment to be made to the others [Primus and Secundus], in the way that it can be made to outsiders? I think payment can be made to them, just as I can stipulate for payment to me or to Titius. Why, then, is not only the stipulation in favor of Primus or Secundus,

masters of the slave, invalid but also [in that case] the payment to them? The reason is that we have not ascertained for whose benefit the stipulation exists and to whom the payment is due.

12 PAUL, *Questions, book 10:* For as each of them is capable of receiving the obligation, we have not ascertained which of them it is intended to benefit, since there is no one who is able to sue.

13 ULPIAN, *Sabinus, book 48:* For when the slave stipulates for his master or an outsider, both elements are present: the stipulation in the person of the master and the payment in that of the outsider. But in this case their equal status vitiates both the stipulation and the payment.

14 JULIAN, *Urseius Ferox, book 3:* When my slave was in the hands of a thief, he stipulated for a payment to be made to the thief. Sabinus denies that a debt is owed to the thief, because at the time when he stipulated, he was not his slave; but I also will not be able to sue on that stipulation. But if he has stipulated without reference to the person of the thief, I do acquire the action, but the thief should be given neither the action on mandate nor any other action against me.

15 FLORENTINUS, *Institutes, book 8:* Whether my slave stipulates for me or himself or his fellow slave or without reference to persons, he acquires for me.

16 PAUL, *Rules, book 4:* A stipulation by a slave of an inheritance for a payment to be made to the future heir by name is void, because, at the time of the stipulation, the heir was not his master.

17 POMPONIUS, *Sabinus, book 9:* If a slave common to me and you stipulates for a general right of way or a right of way in person or with cattle without adding our names, and I alone have land in the vicinity, I alone acquire the right. Even in the case where you have land [elsewhere], the servitude is wholly acquired by me.

18 PAPINIAN, *Questions, book 27:* A slave belongs in common to Maevius and to the *peculium castrense* of a soldier son-in-power who has died, and before the instituted heir accepts the inheritance, the slave stipulates; the whole stipulation is acquired by the co-owner [Maevius], who for the time being is the sole owner, since an inheritance which does not yet exist does not have a share. If it is argued that the son-in-power has an heir and that his inheritance is already in existence, that will not be so, since the benefit of imperial constitutions is available only to enable the son-in-power to make a will in respect of his *peculium*; that privilege ceases before the will has been confirmed by the heir's acceptance. 1. If a slave belonging to Titius and Maevius stipulates for the payment to himself of the share which belongs to Maevius, the stipulation is void, whereas if he stipulated for its payment to Titius, Titius would acquire it. If the stipulation has been expressed without limitation thus, "do you promise to pay that share which belongs to Maevius," without the addition of "to me," the position is almost that since the stipulation is expressed without any vitiating term, it should benefit whomever it can benefit. 2. A slave whose owner had been taken prisoner by the enemy stipulated for a payment to his owner. It is true that what he stipulates for without qualification or receives from another belongs to the prisoner's heir, and that the law is different in the case of a stipulation by his son, because he would not have been in power at the time when he stipulated, nor would he later, like the slave, form part of the inheritance. However, in the present case, it may be asked if the heir should be deemed to get nothing from this stipulation, just as where a slave of the inheritance has stipulated for the deceased or even for the future heir. But in this case, the slave will be put in the same position as the son; for if the son stipulates for a payment to his father who is a prisoner, the matter will be in suspense, and if the father dies in captivity, the stipulation will be regarded as of no effect, since he stipulated not for himself but for another. 3. A slave subject to a usufruct let out his services on hire, and on that account stipulated for a sum of money to be paid each year. When the usufruct has ended, the owner acquires the benefit of the stipulation for the remainder of the term, according to a written opinion of Julian. This view seems to be based on the strongest reasons; for if, say, the term of the hiring has been fixed at five years, since it is uncertain for how long the usufruct will last, at the beginning of each year the payment for that year will go to the usufructuary. Accordingly, the stipulation does not pass over from one to the other, but rather each one acquires as much as legal principle allows. So when the same slave stipulates as follows, "do you promise

payment of as much money as I shall pay you within such a period" it is left in suspense who shall have the action on the stipulation. For if the money is paid from the property of the usufructuary or from the slave's own labor, the usufructuary gets the benefit of the stipulation; if from some other source, then the owner gets it.

19 SCAEVOLA, *Questions, book 13:* If a slave belonging to a third party acts as slave to two others in good faith and acquires something through the property of one of them, it is logical that he should acquire it wholly for the one through whose property he made the acquisition, whether he acts as slave to him alone or to both of them. For in the case of true owners, whenever the slave makes an acquisition for both of them, it is for each according to his share of ownership; but if the acquisition is not for one of them, the other will have it all. Therefore, the same reasoning will apply in the present case, and this third party's slave, who acts for me and you in good faith, acquires through my property exclusively for me because what is not connected with your property cannot be acquired for you.

20 PAUL, *Questions, book 15:* A freeman acts as a slave for me in good faith; he stipulates through my property or through his own labor for the delivery of Stichus who actually belongs to him. The better view is that he acquires for me; for if he were really my slave, he would acquire for me, and it should not be argued that it is as if Stichus were in his *peculium.* But if he stipulates through my property for delivery of Stichus who belongs to me, he acquires for himself. 1. Labeo gives the following case: A father died intestate leaving a son and a daughter in his power. The daughter was always of the belief that nothing was due to her from her father's estate. Thereafter her brother had a daughter and died leaving the latter still a child. Her tutors instructed a slave of her grandfather to stipulate from the person to whom they had sold things from the grandfather's inheritance for whatever amount had accrued to him. I ask you to give your view on what the *pupilla* acquired from that stipulation. PAUL: It is true that a slave who is possessed in good faith and stipulates through the property of his possessor, for whom he acts as slave, acquires for him. But if the sale from the inheritance included things which were owned in common from the grandfather's inheritance, he does not appear to stipulate for the whole amount through the property of the *pupilla,* and so he acquires for both of them.

21 VENULEIUS, *Stipulations, book 1:* A slave owned in common stipulates in this way: "Do you promise to pay ten on the first of January to Titius and Maevius, my masters, whichever of them shall then be alive?" Julian writes that the stipulation is ineffective, because a stipulation cannot be in suspense, and it is not clear for which of them the acquisition has been made.

22 NERATIUS, *Replies, book 2:* A slave subject to a usufruct stipulates without effect for the usufructuary through the property of the owner, but he may effectively stipulate for the owner through the property of the usufructuary.

23 PAUL, *Plautius, book 9:* The same rule applies in the case of one to whom the right of use has been bequeathed.

24 NERATIUS, *Replies, book 2:* If the usufruct is held by two persons and the slave stipulates from his own labor for one of them, the acquisition is limited to the share which the latter has in the usufruct.

25 VENULEIUS, *Stipulations, book 12:* If a slave of an inheritance has stipulated and has received verbal guarantors and acceptance of the inheritance was made later, it is a matter of doubt whether the time [of their liability] runs from the date of the making of the stipulation or from the date of acceptance of the inheritance; so also when the slave of a prisoner of war has received verbal guarantors. Cassius considers that time should be reckoned from the moment when they could be sued, that is, from the date of acceptance of the inheritance or from the return of the owner by *postliminium.*

26 PAUL, *Handbook, book 1:* There cannot be a usufruct without a person entitled; and so a slave of an inheritance stipulates for a usufruct without effect. It is said, however, that one can bequeath a usufruct to him because the legacy does not vest immediately. On the other hand, an unqualified stipulation cannot be suspended. What, then, if he stipulates subject to a condition? Even in this case the stipulation is invalid, because a stipulation receives its force at once, even though action to enforce it may be suspended.

27 PAUL, *Handbook, book 2:* When a common slave buys or stipulates, although the money comes from a *peculium* provided by one of the owners, nevertheless, he acquires for both of them. The result is different in the case of a slave held in usufruct.

28 GAIUS, *Verbal Obligations, book 3:* Julian wrote that if a slave stipulated through the property of his owner for the owner or the usufructuary, he acquired the obligation for the owner; however, payment could be made to the usufructuary, just as to anyone added for payment. 1. If a common slave has stipulated through the property of one of his owners, the better view is that he acquires for both of them, but that the one in regard to whose property the stipulation was made will properly sue his co-owner by the action for dividing common property or the action on partnership in order to recover his share. The same applies also if the slave acquires through his own labor for one of his owners. 2. If the masters themselves have individually stipulated for the payment of the same ten to their common slave and a single reply has followed, they will be co-stipulators, since it is accepted that a master can stipulate for payment to his slave. 3. Just as when he stipulates for one of his masters by name he acquires for that one alone, so it is accepted that if the slave buys something in the name of one of his masters, he acquires for him alone. So also if he lends money which should be repaid to one of his masters, or carries out any other transaction, he can expressly name one of his masters, so that conveyance or payment is made to that one. 4. The question has been raised whether a slave of the inheritance can stipulate for the future heir. Proculus denied that he can, because at the time he did not belong to him. Cassius held that he can, since whoever later becomes heir should be deemed to succeed the deceased from the time of death. This reasoning is supported by the argument that once the mourning is over, the household slaves are considered to belong to the heir from the time of the death, even though he only becomes heir later. Therefore, it is clear that the slave's stipulation acquires for him.

29 PAUL, *Edict, book 72:* If a common slave has stipulated as follows, "do you promise to pay ten to this master, and the same ten to the other," we may say that they are co-stipulators.

30 PAUL, *Plautius, book 1:* A slave belonging to "A" who stipulates expressly for "B" does not acquire for his master.

31 PAUL, *Plautius, book 8:* If a slave stipulates at the direction of his usufructuary or possessor in good faith, in the cases in which he does not in practice acquire for them, he acquires for his owner. That does not apply if they have been expressly named in the stipulation.

32 PAUL, *Plautius, book 9:* If two people have a usufruct in a slave and the slave has stipulated for one of them by name in connection with property belonging to both of them, Sabinus says that since the obligation is owed to one only, it should be considered to what extent the other usufructuary can recover his share, bearing in mind that they have no co-ownership in law. But the truer view is that an *utilis actio* for dividing common property can be brought between them.

33 PAUL, *Plautius, book 14:* If a freeman or a slave belonging to another acts as a slave in good faith and stipulates by direction of his possessor in regard to the property of a third party, Julian says that the freeman acquires for himself and the slave acquires for his master, because the right to direct is an attribute of the master. 1. If two co-stipulators have a usufruct in a slave or possess a slave in good faith and he stipulates with a debtor by direction of one of them, he acquires for that one alone.

34 JAVOLENUS, *Plautius, book 2:* If a slave has been manumitted by will but, not knowing himself to be free, remains as part of the inheritance and stipulates for the payment of a sum to the heir, nothing will be owed to the heirs if they know that he has been manumitted by the will. For he cannot be regarded as having been properly in the status of slavery to persons who were not unaware that he was free. There is a distinction in the case of a freeman who is sold and acts as a slave, because in that case his own state of mind and that of the buyer are the same; however, one who knows that a particular individual is free cannot be regarded as possessing him, even though the individual is ignorant of his own condition.

35 MODESTINUS, *Rules, book 7:* A slave of the inheritance may properly stipulate for both the future heir and the inheritance.

36 JAVOLENUS, *Letters, book 14:* The stipulation of a slave, whose master treated him as abandoned, is of no effect. For one who treats a thing as abandoned rejects it completely, and he cannot benefit from the services of someone whom he wishes not to belong legally to himself. But if a third party has taken possession of the slave, he [the slave] can acquire for him by stipulation; for that is a kind of gift. There is a considerable difference between a slave of an inheritance and one who is treated as abandoned; for the former is retained by right of the inheritance, and anyone who is kept by the general right of inheritance cannot be considered abandoned whereas the latter, having been abandoned by his master's will, cannot be considered as acting for the benefit of the man who rejected him.

37 POMPONIUS, *Quintus Mucius, book 3:* If a common slave stipulates as follows, "do you promise payment to Lucius Titius and Gaius Seius," and they are his masters, the debt from the stipulation is owed to them in equal shares. But if the stipulation is "do you promise payment to my masters," it is owed in proportion to their shares of ownership. And if it is, "do you promise payment to Lucius Titius and Gaius Seius, my masters," there may be a doubt as to whether it is owed to them in equal shares or according to their shares of ownership. The determining factor is which part contains the principal subject of the stipulation and which has been added for purposes of identification; and since here the names came first, it seems more reasonable that they should acquire from the stipulation in equal shares; for the reference to masters is considered to be for identification.

38 POMPONIUS, *Quintus Mucius, book 5:* If my slave stipulates with my freedman for "workdays to be provided for himself," Celsus writes that the stipulation is ineffective; it would be different if he has stipulated without the addition of the words "for himself."

39 POMPONIUS, *Quintus Mucius, book 22:* When a slave subject to a usufruct stipulates for his owner by name in connection with the usufructuary's property or his own labor, he acquires for the owner; but we should ask what action the usufructuary can bring to get recovery from the owner. In the same way, if [another's] slave acts as our slave in good faith, whatever he can acquire for us he may acquire for his owner by stipulating for him by name; but we may ask by what action we can recover it. What our learned friend Gaius has said with good reason is that in each case there can be a *condictio* against the owner.

40 POMPONIUS, *Quintus Mucius, book 33:* Whatever contract a slave has made while he is acting as our slave, even if he has deferred the effect of a stipulation concerning his own alienation or manumission, the benefit of it will be acquired for us, because he was in our power at the time when he made the contract. So also if a son-in-power makes a contract; and even if he puts off the time of his own emancipation, the benefit will be due to us, so long as he did it fraudulently.

BOOK FORTY-SIX

1

SURETIES AND MANDATORS

1 ULPIAN, *Sabinus, book 39:* A surety may be added to any obligation.

2 POMPONIUS, *Sabinus, book 22:* A surety may be taken in respect of loan for use and of deposit, and he will be liable even if the loan or deposit be made with a slave or a *pupillus*, but only so far as there may have been deliberate wrongful intent or negligence on the part of the persons guaranteed.

3 ULPIAN, *Sabinus, book 43:* One who promises satisfaction is deemed to have honored the stipulation for satisfaction, if he provides, as an ancillary debtor, one who can incur an obligation and be sued. But if he produces a slave or a son-in-power, in cases where an action on the *peculium* will not lie, or a woman who can invoke the protection of the *senatus consultum*, it has to be said that the stipulation for satisfaction is not honored. Of course, if he produces an unsuitable surety, it is rather the case that satisfaction is provided; for the person who accepts him as surety thereby approves him as suitable.

4 ULPIAN, *Sabinus, book 45:* A surety can be accepted for the action that I will have against the person for whom I myself stood surety, whether by mandate or by unauthorized administration. 1. A surety both is bound himself and leaves the heir bound, since the latter takes the place of the debtor.

5 ULPIAN, *Sabinus, book 46:* Julian says generally that a person who becomes heir to the person for whom he became guarantor is released from his accessory liability and becomes liable solely as heir. In the end, he writes that if a surety become heir to the person for whom he becomes guarantor, he is released from his liability as surety, being now bound as principal debtor; but a principal debtor succeeding to a principal debtor is liable on two counts. Nor can it be discerned that there is any obligation which he destroys; but such discernment is possible in the case of principal debtor and surety because the liability of the former is greater. For where there is some difference in the obligations, it is possible to ascertain that one is extinguished by the other; but when both are of equal efficacy, it cannot be established why one rather than the other should be extinguished. He [Julian] relates this to a case in which he seeks to demonstrate that there is no novelty in the existence of two obligations in the one person. Such a case does exist. If a person liable on a promise becomes heir to another liable on the promise, he bears two obligations; again, if a promisee under a stipulation becomes the heir of another stipulatory promisee, he bears two types of obligation. Obviously, if he takes action on either of them, he terminates both, evidently because the nature of the two obligations which he has is the same so that when the one is brought into issue, the other is also consumed.

6 ULPIAN, *Sabinus, book 47:* Having stipulated from the principal debtor, I do not take a surety; subsequently, I wish to add a surety; if I do so, the surety is bound. 1. And it is of little relevance whether I bind the surety unconditionally, as from a certain date or under a condition. 2. Indeed, a surety may be forthcoming for both a future and an existing obligation, assuming that there will be, if only natural, a future obligation.

7 JULIAN, *Digest, book 53:* For since what has been paid cannot be recovered, it is fitting that a surety be accepted of this natural obligation.

8 ULPIAN, *Sabinus, book 47:* A surety can also be taken, using the Greek language; for instance, if he says, "I swear on my honor," "I declare," "I wish," or "It is my wish," but even if he said, "I say," it would be treated as if he had said, "I declare." 1. Know too that a surety may be taken for any obligation, real, verbal, or consensual. 2. Again, it is to be known that a surety may be taken even for a praetorian obligation. 3. Indeed, a surety can be taken even after joinder of issue; for there is then an underlying obligation, both civil and natural; Julian also concedes this, and it is the rule which we observe. Now whether the surety may invoke a defense when judgment goes against the principal debtor is a question; for he is not automatically discharged. If, indeed, the surety was taken not in respect of the action to enforce the judgment but only in respect of the conduct of the proceedings, it is most properly to be said that he may invoke a defense; but if he was taken in respect of the whole issue, there will be no defense. 4. If a surety be given by a testamentary tutor, he will be liable. 5. Indeed, even if an action arises from delict, our view is rather that a surety is liable. 6. And generally there can be no doubt on anyone's part that sureties may be accepted for any obligation. 7. It is a common principle for all who enter into obligations on behalf of others that it is established that they are not bound if their obligation is more stringent [than that of their principal]; obviously, they can be accepted on less stringent terms because a surety is properly accepted for a lesser liability; similarly, though the principal debtor is unconditionally liable, [the surety] may be taken as from a given time or under a condition; but should the principal have a conditional liability and the surety an unqualified one, the latter will incur no obligation. 8. Suppose someone to have stipulated for Stichus and to have taken a surety thus: "Do you promise on your honor Stichus or ten?" Julian says that the surety does not incur an obligation because his plight is more onerous; for it could happen that he would [still] be liable if Stichus died. Marcellus, however, notes that it is not so much because of a more onerous plight that he is not under an obligation but because he has rather been accepted in respect of a different obligation; further, in respect of one who has promised ten, a surety cannot be taken to promise ten or Stichus, although in such case his plight is not more stringent. 9. The same Julian says that if someone who stipulates for a slave or ten, takes a surety for "the slave or ten, whichever I choose," he does not put him under an obligation because more onerous terms are imposed upon him. 10. On the other hand, if a person stipulate for a slave or ten, whichever he shall choose, he will properly accept a surety "for a slave or ten, whichever *you* please." "For," he says, "in this way, the surety's position is eased." 11. But equally, if I ask of the principal debtor "Stichus or Pamphilus" and of the surety [also] "Stichus or Pamphilus," I put a correct question because the surety's position is less severe. 12. There is no doubt that a surety for a surety may be accepted.

9 POMPONIUS, *Sabinus, book 26:* Sureties may be taken in part for money and in part for a thing.

10 ULPIAN, *Disputations, book 7:* Should the creditor be uncertain whether the sureties are solvent and one of them, selected by him, is prepared to give an undertaking that his fellow sureties may be sued at his own risk, I say that he is to be heard to this extent, if he offers security and if all his fellow sureties who are said to be solvent are

present; for purchase of a debt is not always easy since payment of the whole amount is not readily available. 1. Proceedings will be divided between the sureties only if they do not deny their liability; for the benefit of division is not to be granted to those who deny. 2. A son-in-power can go surety for his head of household and such suretyship will not be ineffective, first, because he can be made liable for what he can afford and, then, because judgment can go against him even while he is still in power. But let us consider whether the father is liable in such case by reason of his order. And I think that liability on an order applies to all contracts. But if the father is unaware that [his son] has gone surety for him, the action on the order will not lie; however, action can still lie against the father as having had something done to his advantage. Of course, if [the son] should pay after emancipation, an *actio utilis* [against the father] will lie to him; but, so long as he remains in power, he would have such action only if he paid out of his *peculium castrense.*

11 JULIAN, *Digest, book 12:* One who makes a loan to a son-in-power contrary to the *senatus consultum [Macedonianum]* cannot accept a surety from the head of household after the son's death; for he has no action, civil or praetorian, against the head of household, and there is no inheritance in respect of which sureties could be made liable.

12 JULIAN, *Digest, book 43:* Of course, a surety is validly taken in respect of an action which lies in respect of [the son's] *peculium.*

13 JULIAN, *Digest, book 14:* Suppose that on my mandate, you advance ten to Titius and you bring the action on mandate against me; Titius is not thereby released; but I will be condemned to you only if you make over to me your actions against Titius. Similarly, if you sue Titius, that does not release me, but I will continue liable to you only for what you cannot recover from Titius.

14 JULIAN, *Digest, book 47:* When the promisor [in a stipulation] becomes heir to his surety, the [ancillary] obligation of suretyship is destroyed. Then what? The debt will be claimed from him as principal, and should he make use of a defense available to the surety, a replication on the facts or one of fraud will be granted [to the creditor].

15 JULIAN, *Digest, book 51:* If you should stipulate for something from me without cause and I provide you with a surety and do not wish him to invoke any defense but rather to pay and to proceed against me in the action on mandate, a defense should be granted to the surety despite my wishes; for it is in his interest to retain his money rather than to claim back from the principal debtor what he pays to the stipulator. 1. Suppose that two people are sureties to you in the sum of twenty and one of them, in order that you should not claim from him, gives or promises you five; the other will not be released, and if you sue him for fifteen, you will not be defeated by a defense; but should you institute proceedings for the other five against the first surety, you will be defeated by the defense of bad faith.

16 JULIAN, *Digest, book 53:* No one can incur obligation as a surety to one to whom the principal promisor is not under an obligation. Accordingly, if a slave owned in common by Titius and Sempronius stipulates by name for something to be given to Titius and puts to the surety the question, "do you promise to give to Titius or to Sempronius," Titius indeed can claim from the surety, but the person of Sempronius is relevant only in that performance can be made to him before joinder of issue even in the ignorance or despite the unwillingness of Titius. 1. One who has promised to give something in a certain place is bound by a somewhat more stringent obligation than if he had been asked without qualification; for without the stipulator's consent, he cannot make performance in any other place. Hence, if I put an unqualified question to the principal debtor and accept a surety with the specification of a place, the surety will not be bound. 2. But again, if a principal debtor, taken at Rome, promises to pay at Capua and the surety at Ephesus, the surety will not be bound any more than if the principal had promised conditionally and the surety to pay on a certain date or unconditionally. 3. A surety can be accepted whenever there is some obligation, civil or natural,

to which he may adhere. 4. There are deemed to be natural obligations not only when some action lies in respect of them but also when any payment made [in respect of them] cannot be reclaimed. For although natural debtors cannot strictly be said to be debtors, they are loosely so regarded, and anyone accepting money from them is regarded as receiving his due. 5. Suppose that a stipulation is taken [for performance] at a given time and a surety therefor is taken under a condition; his obligation is suspended so that if the condition is fulfilled before the time [for performance], he will not be bound; but if the time and satisfaction of the condition coincide or the condition be satisfied after the due date, he is bound. 6. Let us put the case that a surety is taken in the following way: "Do you promise on your honor, if the principal promisor does not pay the forty which I advanced to him?" The most plausible interpretation is that the surety will be bound if the principal, when called upon to pay, does not do so. But again, should the principal die before being called upon, the surety will be bound; for in this event too it is true that the principal has not paid.

17 JULIAN, *Digest, book 89:* Sureties should receive the relief that the stipulator should be required to sell the debts of the others to the one of them prepared to pay in full.

18 JULIAN, *Digest, book 90:* One who delegates his debtor [to his own creditor] is deemed to give the money which is owing; hence, if a surety delegates his debtor, albeit one who is insolvent, he can at once bring the action of mandate.

19 JULIAN, *From Minicius, book 4:* Unknown to his master, a slave went surety for someone and paid money on that account; the question was whether the master could recover or not from the person to whom payment was made. His reply was that it is relevant under what head [the slave] went surety. If his suretyship was in a matter concerning his *peculium*, what he paid out of the *peculium* could not be recovered by the master; but what he may have paid out of the master's assets could be claimed; but if he went surety other than in the matter of the *peculium*, anything which he paid from his master's assets could equally be the object of a *vindicatio*, and anything paid out of the *peculium* could be the object of a *condictio*.

20 JAVOLENUS, *Letters, book 13:* But again, if the slave's master paid the money, he could recover it, not from the person for whom the slave went surety but from the person to whom it was paid, since a slave cannot incur the obligation of suretyship. It follows, therefore, that he cannot recover from the person for whom [the slave] went surety, since he is not personally liable on the debt, nor can he be released on the ground of the payment of the money from an obligation therefore which did not bind the slave.

21 AFRICANUS, *Questions, book 7:* An heir accepted a surety from one indebted to the inheritance and then made over the inheritance under [the *senatus consultum*] *Trebellianum*; he [Julian] said that the liability of the surety remains as before and that in such a case, the same course of action is to be observed as would be followed when an heir, against whom an emancipated son obtains possession of the estate, accepts a surety. In each case, accordingly, actions are transmitted. 1. It is no novelty that a surety, on two counts, should be liable in respect of the same sum of money; for if, having been taken for a certain date, he should, shortly thereafter, be accepted unqualifiedly, he will be liable on both counts. The same applies if a surety should become heir to a fellow surety. 2. When I had advanced money to your slave, you manumitted him, and then I accepted the same surety [in respect of the debt]. If the surety accepted liability for the obligation which rested on you within a year [from the manumission], he [Julian] says that he is bound; but that if it was for [the slave's] natural obligation, it is rather the case that no transaction has been effected. For it cannot be admitted that a person becomes bound by going surety for himself. But he thought that if the manumitted slave became heir to his surety, the ground of the suretyship survives and that in any event, there would still be the natural obligation so that though the civil obligation no longer exist, what has been paid cannot be recovered.

Nor does it conflict with this that if the principal debtor become the heir of his surety, the ancillary obligation is destroyed; for there cannot be a double civil obligation with the same person [over the same thing]. Conversely also, if the surety become heir to the manumitted slave, there remains the same obligation upon him, although his liability is natural and one cannot be surety for oneself. 3. Should, though, the stipulator institute his debtor as heir, he wholly destroys the obligation of the latter's surety, whether the debtor was so at civil law or [only] naturally, because no one can be under obligation for himself to the same person. But if the same stipulator instituted the surety as his heir, it is beyond doubt that he would destroy only the obligation of suretyship. Evidence thereof is that if possession of the debtor's assets were granted to the creditor, it is equally to be said that the surety's obligation would continue. 4. He [Julian] replied that when you and Titius were liable for the same money, the man who went surety for you could also stand surety for Titius, even though he owed the same money to the same creditor; and that this would not be illusory for the creditor; for in several instances it would be of advantage, by way of example, if the person for whom he first went surety should become [the creditor's] heir, though the earlier obligation thereby disappears, the later one would remain. 5. The question was raised whether, when the surety became heir of the stipulator, he would have an action on mandate against the debtor, as it were, claiming from himself. His reply was that since the debtor remains under an obligation, the surety cannot be regarded as claiming from himself; consequently, he should sue on the stipulation rather than on mandate.

22 FLORENTINUS, *Institutes, book 8:* When the debtor on a stipulation dies, a surety can be accepted even before his inheritance has been accepted, because the inheritance enjoys the function of a person, like a municipality, a club, or a partnership.

23 MARCIAN, *Rules, book 4:* If I stipulate, "[do you promise to give] ten to me or to Titius," Titius cannot accept a surety because he is added only as one to whom payment may be made.

24 MARCELLUS, *Replies, sole book:* When Lucius Titius wished to stand surety for his brother Seius to Septicius, he sent a letter in these terms: "If my brother seeks an advance from you, I ask you to give him the money, relying on my honor and at my risk"; following this letter, Septicius gave money to Seius; then, Titius left his brother Seius, among others, as heir to a third of his estate. My question is: Since Septicius's action against the debtor Seius is merged, in respect of a third, can he proceed against Seius's co-heirs in full? Marcellus replied that an action on mandate could be brought against Seius's co-heir for no more than his hereditary share.

25 ULPIAN, *Edict, book 11:* Marcellus writes that if someone should stand surety for a *pupillus* who has contracted an obligation without his tutor's authority or for a spendthrift or lunatic, he should [on the whole] not be given relief because the action on mandate does not lie to such persons.

26 GAIUS, *Provincial Edict, book 8:* Under a letter of the deified Hadrian, the obligation is not automatically divided between [co-] sureties. Accordingly, if one of them dies without heir before his share is exacted from him, or if he should become indigent, his share adds to the burden of the others.

27 ULPIAN, *Edict, book 22:* Where there are more than one surety, one taken without qualification, another taken as from a certain time or under a condition, the unqualified surety should have the relief, so long as the condition is capable of satisfaction that during that period, he may be sued only for his share. But if, when the condition is realized, the conditional surety should be insolvent, Pomponius writes that the action is restored against the unqualified surety. 1. Furthermore, if there be a surety [or more] for the surety, he will be liable in the same cause; to such persons, the rulings of the deified Hadrian are equally applicable. 2. Again, if there be a question over the

solvency of the principal surety, the resources of the subsequent surety are to be added to his. 3. Pomponius writes that relief is to be granted to the heirs of sureties as it is to the surety himself. 4. Should a principal surety himself be the surety of a surety, he cannot ask that the obligation be divided between himself and that other surety; for he stands in the debtor's shoes; and the debtor cannot ask that the obligation be divided between himself and the surety. In the same way, if, of two sureties, one himself provide a surety, the obligation will not be divided against him for whom he is surety. On the other hand, the obligation is divided against a co-surety.

28 PAUL, *Edict, book 25:* Should a surety contend that the other sureties are solvent, the defense is still to be given him "if they be not solvent."

29 PAUL, *Edict, book 18:* If I stipulate under an impossible condition, no surety can be taken.

30 GAIUS, *Provincial Edict, book 5:* Anyone can go surety for another, even though the [debtor] promisor be unaware of the fact.

31 ULPIAN, *Edict, book 23:* If a surety or anyone else, on the debtor's behalf, should pay the creditor before time, he will have to await the day on which he was due to pay [before he can proceed against the debtor].

32 ULPIAN, *Edict, book 76:* Even though the debtor does not wish it, a defense [or any other advantage] stemming from the person of the debtor can avail his surety and others acting for him.

33 ULPIAN, *Edict, book 77:* Suppose that Titius for whom I accepted security in one litigation left free and as his heir the slave that I was claiming from him; if, indeed, the matter was in truth his own, it must be said that the action is to be transferred against him [the freedman], and if he does not accept this, the stipulation becomes enforceable. But if he was mine and he accepted the inheritance without my instruction, the sureties will be liable on the ground that the issue was undefended; should he, however, have accepted on my direction, the stipulatory liability disappears. Of course, if [the slave] were mine and I delayed acceptance [of the inheritance] in order that when I should have been successful [in the proceedings], I should then order him to accept and, in the meantime, I wish to proceed on the ground that the issue is not defended, the stipulation does not become enforceable because an upright man would not hold that it does.

34 PAUL, *Edict, book 72:* Those who promise in an ancillary capacity can be accepted on more lenient, but not on more onerous, terms. Julian, accordingly, thinks that if I stipulate from the principal for myself and from the surety for myself or Titius, the position of the surety is more favorable because he has the option of paying to Titius; should I, though, stipulate from the principal for myself or Titius but from the surety for myself alone, Julian says that the surety's liability is more onerous. What, then, if I ask the principal for Stichus or Pamphilus, the surety for Stichus only? Is his position more onerous because he has no option? Or is it more favorable, which is the true view, because he can be released by [Stichus's] death?

35 PAUL, *Plautius, book 2:* When anyone goes surety for a slave, he is fully liable, even though there be nothing in the *peculium.* Obviously, if he went surety for the slave's master, who was being sued in an action on the *peculium,* he would be liable only to the extent of the *peculium* as it stood when the issue was decided.

36 PAUL, *Plautius, book 14:* Suppose that someone who has both a principal debtor and sureties surrender his actions, having been paid by one of the sureties; indeed, it can be said that no actions any longer exist, since he has received his due, and, thereby, all are released. But the case is not so; for he does not receive in full, but, in a sense, he sells his debtor's debt, and he has actions and is himself liable to make over those actions.

37 PAUL, *Plautius, book 17:* Should a person, having been released by the passage of the relevant time, give a surety, the latter incurs no liability because no suretyship arises from error.

38 MARCELLUS, *Digest, book 20:* If I stipulate for Stichus or Pamphilus, at the promisor's election, I cannot accept a surety for Stichus or Pamphilus as the surety may choose because that would put it in his power to opt for the one that the principal debtor would not wish to give. 1. I accepted a surety from Titius who was liable under a condition to give me ten by the terms of a will and then became his heir; thereafter, the will condition was fulfilled; my question is: Is the surety liable to me? The reply was that if you became heir to the person, away from whom a conditional legacy was bequeathed to you, when you had accepted a surety from him, you cannot hold the surety under obligation to you, because there is no principal debtor for whom he is liable and there is no thing which can be due.

39 MODESTINUS, *Rules, book 2:* An action is not to be granted for a surety to sue his fellow surety. Hence, where there are two sureties for the same sum and the one selected by the creditor pays in full without actions being ceded to him, the other surety can be sued by neither the creditor nor his co-surety.

40 MODESTINUS, *Rules, book 3:* When there are two debtors, then, whether a surety is given by both or by one of them, he is properly liable in full.

41 MODESTINUS, *Replies, book 13:* His reply was: If sureties were accepted for something which could not be recovered from curators and, on the coming of age, the whole of it could be recovered both from curators and from his heirs and, on the former *pupillus* becoming insolvent, an effective action, without risk, would lie against the sureties. 1. He further replied that if one of the mandators be condemned for the full amount, he can, when proceedings to enforce the judgment are launched against him, require that the actions against those who gave the same mandate as himself be assigned to him.

42 JAVOLENUS, *Letters, book 10:* Put the case that I accept a surety on the following terms: "Since I advanced ten, do you, on your honor, promise in respect of that money a thousand *modii* of grain?" The surety incurs no obligation since a surety cannot be committed for something other than what was advanced; money cannot be quantified in terms of merchandise in the way that merchandise, measured by quantity or number, may be assessed in money.

43 POMPONIUS, *Miscellaneous Readings, book 7:* I stipulate from Titius and accept you as surety; then I stipulate the same sum from another and accept another surety. They are not co-sureties because each is surety for a separate debt.

44 JAVOLENUS, *Letters, book 11:* You stipulated that a piece of work should be done, to your satisfaction, by a given time, and that if it was not so completed, you took sureties for the amount involved in your letting it in order that it be completed. The work not being completed, you let it out to someone else, and, the later contractor not doing the job, you completed it yourself; my question is: Is the surety bound? The reply was: On the wording of the stipulation which you have put forward, the sureties are not bound. For you did not do what was comprised in the stipulation, that is, you did not let out the job to another, even though you later so let it. For the subsequent letting is treated as though it did not happen and as if you immediately commenced the job yourself.

45 SCAEVOLA, *Digest, book 6:* The surety of the vendor of two estates, having been sued by the purchaser of the one which was the object of eviction, was condemned for a certain sum; the question was raised whether he could take proceedings against the vendor's heir before the day on which he would be obliged to honor the judgment. The reply was that action indeed was possible but that, there being good cause, it was a matter for the judge that the surety be either defended or released.

46 JAVOLENUS, *Posthumous Works of Labeo, book 10:* When an enactment seeks to obstruct sales, a surety is also released, the more so because, by such an action the defendant is reached.

47 PAPINIAN, *Questions, book 9:* Where the deportation of a debtor is decreed, Julian writes that no surety for him can be accepted; it is as though his whole obligation is extinguished. 1. Suppose that in a matter affecting the *peculium*, a son-in-power takes a surety in these terms, "do you promise on your honor the amount that I advance," and then makes the advance after his emancipation. Assuming the debtor to be under no [civil] obligation, he will not be liable to the head of household, but humane considerations make him liable to the son.

48 PAPINIAN, *Questions, book 10:* Should Titius and Seia go surety for Maevius, we delete the woman and grant an action for the full amount against Titius who should know or, anyhow, not be unaware that a woman cannot incur an obligation on another's behalf. 1. Similar to this is the question whether, when one surety obtains *restitutio in integrum* because of his lack of years, the other should shoulder the whole burden of the obligation. That other should be liable for the whole, if the *minor* took on his responsibility after him, because of the uncertainty of age and restitution. But if the *minor* were induced by the creditor's guile to become a surety, the creditor should not be succored against the co-surety any more than if, novation being made and the *minor* overreached, he sought that an *actio utilis* be granted him against the original debtor.

49 PAPINIAN, *Questions, book 27:* Should an heir pass over the debtor, released in the will, but seek to sue his surety, there will be available to the surety the defense of fraud, grounded in the heir's chicanery, which would have been available to the principal debtor, had he been sued. 1. If one of the two heirs of a surety should mistakenly pay the whole amount, there are those who think that he has a *condictio* and thus that his co-heir remains bound; they endorse the view that even without the *condictio*, the co-heir's obligation continues, because a creditor who, thinking himself so bound, pays back part to a person who gives him the whole amount, has no *condictio*. Should, though, two sureties be taken for, say, twenty and one of the two heirs of one surety pay the whole amount to the creditor, he will indeed have a *condictio* for the ten for which, in law, he had no liability; however, we have to consider whether he can recover another five thousand, assuming the other surety to be solvent; for the heir of a surety, from the outset, is to be heard as would be the surety himself so that, of course, the individual sureties who are [solvent] are sued for their share. The stricter and more appropriate view in either case is that the payment of the amount not due should not be recoverable; this is further indicated in a letter of the deified Pius in respect of a surety who paid the full debt. 2. The question was put whether a surety who promised at Rome that he would give the money at Capua could at once be sued if the principal debtor was at Capua. I said that the surety could no more be the subject of immediate proceedings than if he had himself promised at Capua when the principal debtor could not yet get to Capua; nor was it relevant that, from this standpoint, no one doubted that the surety was not yet liable because the principal debtor himself was not yet suable. For conversely, if someone should reply that since the principal debtor is at Capua, the surety can at once be sued, ignoring the tacitly understood period of time [to get there], the result would be that the surety could be sued in a case where the debtor himself, being at Rome, could not be sued. Consequently, the view commends itself to us that the surety's obligation entails the condition of the tacitly requisite period from the standpoint of both debtor and surety; for to those replying differently, the surety would be seen as taken on more onerous terms contrary to what the law allows.

50 PAPINIAN, *Questions, book 37:* A creditor becomes part heir to his debtor with the surety as co-heir; so far as his own share is concerned, the obligation lapses by reason of the merger or [more correctly] through his ability to satisfy his claim; so far as concerns his co-heir's share, however, the obligation remains intact, not as one of suretyship but as an hereditary obligation, because the greater extinguishes the lesser [liability].

51 PAPINIAN, *Replies, book 3:* Liability in litigation is to be divided between those sureties who promised, on their honor, the total sum and their individual shares. The case would be different if the wording were: "Do you promise on your honor the whole or your share?" For then, from the outset, it is agreed that each owes only his share. 1. A surety who pays part of the sum in his own name or that of the principal debtor should not object to accepting proceedings for the balance after the portion has been deducted; for the understanding is that that sum is divided between those who are solvent which they individually owe at the time of proceedings. However, it is more humane that if the other surety be solvent at the time of joinder of issue, the one who paid should be granted the relief of a defense. 2. Two promisors separately gave sureties; the reluctant creditor is not obliged to divide his actions between all the sureties but only between those standing surety for each individual debtor. Obviously, if he does wish to divide his proceedings among them all, there is nothing to prevent his doing so any more than if he sued two debtors for their shares. 3. A creditor is not obliged to sell a pledge if, ignoring the pledge, he prefers to sue a surety who was taken without qualification. 4. Suppose that the action be divided among the sureties and one of them becomes insolvent after joinder of issue; this does not increase the liability of the solvent surety, nor will the plaintiff get any relief for his lack of years; for he cannot be regarded as having been deceived in exercising a general right. 5. When the assets of a condemned surety have been claimed by the imperial treasury, if the action thereafter is divided among sureties, account should be taken of the treasury as of an heir.

52 PAPINIAN, *Replies, book 11:* The destruction of a lost pledge falls to the risk of a surety no less than to that of the principal debtor, and it is not germane that the surety was taken on the terms "for what cannot be recovered by the sale of the pledge"; for these words cover also the whole debt. 1. Where the action is divided between sureties, if the person found liable ceases to be solvent, that will be a loss when due to the bad faith or procrastination of tutors who could have enforced the judgment. But if it emerge that the action was divided among those who were insolvent, relief will be sought for the *pupillus* by way of *restitutio [in integrum]*. 2. It is accepted that sureties given by tenant farmers are also liable for the money value of land, part of a dowry; for this type of lease attracts its burden; and it makes no difference whether the sureties accepted their obligation at once or after an interval of time. 3. Where several persons give a mandate for the advancing of the same sum of money, if one be selected as defendant in proceedings, [the others] are not released when judgment goes in his favor; but all are released by repayment of the money.

53 PAPINIAN, *Replies, book 15:* The sureties of a sum demanded are correctly sued on the contract, without any preliminaries, by the creditor who has brought proceedings against the principal debtor.

54 PAUL, *Questions, book 3:* Suppose that a creditor who has taken a surety for a loan is deceived in making a contract of pledge; he proceeds by the counteraction on pledge, which action takes into reckoning the creditor's interest. But this action cannot burden the surety; for he bound himself not for the pledge but for the money lent.

55 PAUL, *Questions, book 11:* Put the case that I stipulate from Seius as follows: "Do you solemnly promise to give the money which at any time I advance to Titius?" I take sureties and make more than one advance to Titius; Seius is unquestionably liable for all the sums and, thereby, the sureties also; and whatever can be salvaged from his assets is to benefit all alike.

56 PAUL, *Questions, book 15:* If someone stands surety for one, not in fact a freedman, who promised to perform services, he will incur no obligation. 1. Again, if a son should stipulate from his head of household or a slave from his master, a surety who was taken would be under no liability because no one can be under obligation both for and to the same person. Conversely, a surety accepted by a head of household stipulating from his son or by a master doing likewise from his slave is liable. 2. Should you lend as your own money belonging to another, without a stipulation, Pomponius says that a surety [therefor] is not bound. What, then, if a condition comes into operation after the money has been spent? I think that the surety is liable, since he is regarded as being bound in respect of anything which may eventuate from that payment. 3. A surety may be taken in respect of an action on theft as also for one liable under the *lex Aquilia*; popular actions are a different matter.

57 SCAEVOLA, *Questions, book 18:* A surety cannot be sued before the principal debtor becomes liable.

58 PAUL, *Questions, book 22:* If, having stipulated from [my] tenant farmer, I accept a surety, there is one stipulation for every year's rent, and thus the surety is liable in respect of them all. 1. When, by his own act, the principal debtor perpetuates his obligation, that of the surety also continues, as when [the debtor] delays in delivering Stichus and the latter dies.

59 PAUL, *Replies, book 4:* Paul made answer that a surety to whom pledges given by co-sureties were transferred is regarded as being substituted not to the position of a purchaser but to that of the person who accepted the pledges. Accordingly, an account should be taken of their [the pledges'] produce and interest.

60 SCAEVOLA, *Replies, book 1:* His answer was that whenever the debtor is so released that he remains liable under natural law, the surety continues liable; but when the obligation shifts by some form of novation, the surety is to be discharged, whether as a matter of law or by [the grant of] a defense.

61 PAUL, *Replies, book 15:* If, as stated, it was agreed that the money advanced should be repaid in Italy, we must infer that the mandator agreed on the same terms.

62 SCAEVOLA, *Replies, book 5:* Suppose that a surety declare to the creditor that he should force the debtor to pay the money or [alternatively] sell the pledge and that he should cease [to be surety]; can the surety be countered by the defense of bad faith? His answer was negative.

63 SCAEVOLA, *Replies, book 6:* It was agreed between a [female] creditor and her debtor that if the hundred which she advanced were not repaid when first asked for, it would be lawful for her to sell ornaments given in pledge within a certain period and that any shortfall on the sale and what was due as interest should be rendered to her; a surety was also taken; the question was whether the surety would be liable in full. His answer was that on the facts stated, the surety would be liable for the deficiency on the sale of the pledges.

64 HERMOGENIAN, *Epitome of Law, book 2:* A surety who offered money for one under twenty-five and, in apprehension of *restitutio in integrum*, deposited it sealed in a public place can at once proceed by the action on mandate.

65 HERMOGENIAN, *Epitome of Law, book 6:* Just as the principal debtor is bound only if he promises on his own behalf, so also sureties are bound no other than if they promise that they themselves will give or do something; for their promise that the principal debtor would give or do something would be nugatory since no one can validly promise another's conduct.

66 PAUL, *Neratius, book 1:* If another man's slave should go surety for Titius and pay, Titius is released, should the [slave's] master proceed against him by the counteraction on mandate; for one who sues on mandate is deemed to have ratified the payment.

67 PAUL, *Neratius, book 3:* Having invoked a defense which should have availed you, you were found liable through the fault of the judge; nothing is due to you by right of mandate; for it is more equitable that the injustice done to you should remain yours rather than be transferred to another, obviously, if you gave cause for the injustice through your own fault.

68 PAUL, *Decrees, book 3:* He ruled that the sureties of magistrates should not be sued for a penalty or a fine for which they had given no undertaking. 1. Petronius Thallus and others stood surety for Aurelius Romulus who was a tenant of the state at a hundred per year rent; the imperial treasury confiscated the assets of Romulus as being due to it and sued the sureties for both principal sum and interest; and they demurred. The record of the suretyship having been read, he ruled that since the sureties committed themselves only for one hundred per year and not for the whole period of the lease, they were not liable for interest; but whatever was realized from [sale of] the assets should go first to interest and the balance to the capital; the sureties would thus be liable for the deficiency on the capital as in the case of pledges sold by the creditor.

2. Sureties cannot be sued when the principal debtor has been released by a settlement.

69 TRYPHONINUS, *Disputations, book 9:* A tutor appointed to the son of one to whom he was under obligation as surety must claim payment from himself, and although he be released by lapse of time, he will be liable under that head in the action on tutelage; so also his heir against whom proceedings are taken on the tutelage, not on the suretyship. Granted that [the heir] pays as tutor, not as surety, I said that even though he be released by lapse of time, he will have the action on mandate against the principal debtor. The claim for the debt lies under both heads; for by payment of the sum, he releases that debtor from the obligation in respect of which he went surety for him, and it is not the designation of the action but the ground of the debt to which we must look. For although the tutor who is bound to his *pupillus* as surety for the debtor pays the *pupillus* with himself as backer, since [by the payment], the debtor being released, the tutor and surety is also released, which he could not effect by his authority; still, if he acted as paying not on his own behalf but on that of Titius so as particularly to release the latter, he will have the action on mandate [against Titius].

70 GAIUS, *Verbal Obligations, book 1:* If I take a conditional stipulation from a debtor, I can take a surety under the same and another condition so long as I link them together; for then, unless both conditions are satisfied, he will not be liable, although the principal debtor will be liable under the one condition. But if I impose the conditions disjunctively, the surety's position will be more onerous, and he will not be bound; for whether the condition common to both or the other be realized, he will be regarded as bound while the principal debtor is liable only if the common condition be satisfied; accordingly, the surety either incurs no liability or, more probably, is liable only if the common condition be realized first. 1. When each is asked to promise under different conditions, it matters which condition is first fulfilled. If it be that attached to the principal debtor, the surety will also become liable when his condition is fulfilled, as though from the outset the principal had been taken without qualification but the surety conditionally. On the other hand, should the surety's condition be the first realized, he will not be liable; it will be as if he had initially been accepted without qualification while the principal accepted a conditional obligation. 2. Should the principal be liable for [the ownership of] land while the surety is taken for the usufruct therein, the question arises whether the surety has a lesser obligation or no obligation at all, being accepted for a different thing. The basis of hesitation is whether the usufruct is part of the thing or something different in its own right. However, since the usufruct is a right in and of the land, it would be incompatible with the civil law that the surety should not be liable on his undertaking. 3. A surety can be accepted from a slave to the extent that the master himself properly accepts a surety from him for what is due to himself; moreover, there is nothing to prevent the question being put to such surety by the slave himself. 4. It is certain that you cannot take a surety when you stipulate from a lunatic because not only does the stipulation itself effect nothing but no transaction at all is held to take place. But if I should take a surety on behalf of a lunatic who is under a legal obligation, the surety will be liable. 5. The common observation that a surety cannot be taken in respect of delicts is to be understood not in the sense that the victim of a theft cannot take a surety for [the amount of] the penalty (for weighty reasons convince one that the penalties for delicts should be paid) but rather in the sense that one who commits theft with another cannot bind a surety for the share that he wishes to be given over to him from the theft; and one who, urged into the theft by another's exhortation, cannot accept a surety for the penalty for the theft from the person who incited him. In these cases, this reason prevents the surety's obligation, namely that the surety adheres to no cause, since a partnership entered into for a nefarious purpose is of no effect.

71 PAUL, *Questions, book 4:* Granius Antoninus was mandator to Aurelius Palma on behalf of Julius [Junius] Pollio and Julius Rufus in respect of money so lent to them that both were liable for the same thing. The estate of Julius passed to the imperial treasury which also became successor to the creditor. The mandator claimed that he was released by right of merger since the treasury was heir to both creditor and debtor. And if, indeed, there were only one debtor, I would not have doubted that like a surety, the mandator also would be released. For although a mandator is not released when the principal debtor is brought to court proceedings, nevertheless, when the creditor succeeds to his debtor, a mandator is also released, as though the obligation is extinguished by right of satisfaction or because he cannot be mandator both to and for the same person. But when there are two debtors and the creditor is heir to one of them, there is good ground for doubt whether the other debtor is also released, as though the money has been paid or only a person exempt by the merger of the obligation. In my view, a person becomes exempt on the acceptance of the inheritance by the merger of obligations, and backers of that person are also released because they cannot be under obligation both to and for the same individual; they could not be so from the outset, and they do not remain so. And so one of two debtors of the same sum is not released, nor, through him, is his surety or mandator. Of course, since he can proceed by the action on mandate against even the creditor, he will be given the defense of bad faith if proceedings are initiated against himself; but the creditor can take action against either debtor, in full if they were not partners or for a share if they were partners; I think that it follows that the debtor is not released by the merger of the obligation. 1. Let us suppose that one of the promissory debtors obtains an agreement that no claim will be made against him, and then the mandator pays [the creditor]; he can bring the action on mandate even against the beneficiary of the pact; for the creditor's agreement does not remove another man's right of action. 2. The accepted view is that the mandator is liable even if he gives a mandate for the loan of money to a creditor who charges interest.

72 GAIUS, *Verbal Obligations, book 3:* Suppose that a surety becomes bound under the condition, "if the ship shall have come from Asia," and that I took him as surety in such wise that he should be liable only for the period of his life; suppose also that while the condition was pending, the surety was formally released and that he died, the condition still pending; I can sue the debtor forthwith because the realization of a condition cannot impose an obligation on a dead man or confirm the formal release.

73 PAUL, *Edict, book 76:* When a procurator was bringing an action *in rem*, he gave an undertaking that his principal would ratify the matter. After he had been unsuccessful, his principal returned and took proceedings over the same issue; the defendant, being in possession of the thing and unwilling to return it, was accordingly cast in a large sum; sureties are no longer liable; for there cannot be imputed to sureties what he paid up in respect of his own penalty.

2

NOVATIONS AND DELEGATIONS

1 ULPIAN, *Sabinus, book 46:* Novation is the transformation and metamorphosis of an earlier debt into another obligation, whether civil or natural. This happens when, from the preceding cause, a new [obligation] is so constituted that the former one is destroyed. For novation derives its designation from novelty and new obligation. 1. It matters not which [obligation] comes first, natural, civil, or praetorian nor whether it be verbal, real, or consensual; whatever the original obligation, it can be verbally novated, provided that the subsequent obligation has effect at civil law or naturally, as when a *pupillus* promises without his tutor's authority.

2 ULPIAN, *Sabinus, book 48:* All matters can be brought to novation; for anything, whether or not contracted verbally, can be novated and, from any obligation, be converted into a verbal obligation, provided that we appreciate that novation will occur only if the intention is that the obligation be novated; if that is not the case, there will be two obligations.

3 POMPONIUS, *Sabinus, book 1:* A person interdicted from dealing with his assets cannot novate his obligation unless his position becomes thereby more favorable.

4 ULPIAN, *Sabinus, book 5:* If I delegate to you my debtor of a usufruct, my obligation is not novated, although the person delegated should be safe vis-à-vis me by a defense of bad faith or on the facts and not only while the usufruct continues but also after its extinction; for he is disadvantaged if his usufruct survives after my death. The same is to be said of any obligation inhering in a person.

5 ULPIAN, *Sabinus, book 34:* An obligation for a given time can be novated even before the date arrives. And it is generally settled that, a stipulation for a given time having been made, the novation operates; but action can not be taken on that stipulation until that time arrives.

6 ULPIAN, *Sabinus, book 46:* Suppose that I stipulate so: "Do you promise on your honor to pay the amount which I do not obtain from my debtor Titius?" There is no novation because there is no intention of novation. 1. When someone advances money without a stipulation and, in the same dealing, takes a stipulation, there is one contract. The same is to be said if the stipulation comes first and the money is then handed over.

7 POMPONIUS, *Sabinus, book 24:* When we stipulate for money lent, I do not think that the obligation arises from the coin-counting and is novated by the stipulation because the intention is that only the stipulation should bind and the counting out is rather to be seen as being for the implementation of the stipulation.

8 ULPIAN, *Sabinus, book 46:* I stipulate for Stichus to be given to me and then, the promisor being legally at fault for delay in delivery, I stipulate for him again. Risk [in the slave] ceases to rest on the promisor, as though his [culpable] delay has been purged. 1. Should legacies or *fideicommissa* be made the objects of a stipulation and this be done for the purpose of novation, there will be novation; at once, if they were left without qualification or as from a certain time, only on fulfillment of the condition, if they were left conditionally. For in other cases, one who stipulates for a given time, novates immediately, if that be the intention since it is certain that the day will come at some time; but one who stipulates under a condition, novates not forthwith but when the condition is satisfied. 2. Suppose someone to stipulate from Seius: "Do you solemnly promise to give what I shall have stipulated from Titius?" If I subsequently stipulate from Titius, is there a novation with only Seius liable? Celsus says that there is a novation if novation was intended, that is, that Seius should owe what Titius promised, for, he says, the condition of the first promise may be fulfilled and novation occur at the same time; and that is the rule which we observe. 3. The same Celsus says that the right of action to enforce a judgment is not novated by a stipulation that the judgment will be satisfied; and properly so, because what that stipulation achieves is simply that sureties give an undertaking not that there is a departure from the obligation arising on the judgment. 4. I stipulate from Tertius the ten which Titius owes me or the ten which Seius owes; Marcellus is of opinion that neither of them is thereby released but that Tertius can elect for which of them he wishes to pay. 5. Suppose a husband to stipulate from his wife, by way of dowry, the dowry promised him by another; the dowry is not doubled, but there can certainly be novation, if that be intended. What does it matter whether she herself or anyone else promise? For if someone else promises what I owe, I will be released if there be the intention of novation; if there be no such intention, we are both liable but either will be released on payment by the other. But if someone should stipulate for what is due to me, he does

not take away my right of action unless it be by my wish that he stipulates; however, one who promises what I owe releases me, even against my will.

9 ULPIAN, *Sabinus, book 47:* If a *pupillus* stipulate without his tutor's authority that his property be intact and, become adult, ratify the stipulation by way of novation, no action on tutelage will lie. Should he not so ratify, he would have an action on the stipulation even though he had brought the action on tutelage; but the judge in the tutelage action should give judgment [against the tutor] only if there was granted release from the stipulation. 1. One who stipulates under a condition which is bound to eventuate is deemed to make an unqualified stipulation. 2. A man who stipulates for a right of passage with animals and then for a simple right of way effects nothing, any more than one who, having stipulated for a usufruct, then stipulates for use. But one who, having stipulated for a right of way, then stipulates for a right of passage with animals, stipulates for something greater; for a right of way is one thing, passage with animals another.

10 PAUL, *Sabinus, book 11:* One to whom performance may properly be made may novate, except in the case where I stipulate for performance to me or to Titius; for Titius cannot novate although performance could validly be made to him.

11 ULPIAN, *Edict, book 27:* To delegate is to give to the creditor or other person to whom he is directed a different debtor in one's own place. 1. Delegation is effected by stipulation or by joinder of issue.

12 PAUL, *Edict, book 31:* A person who delegates a debtor who was aware that he could protect himself by the defense of bad faith is to be regarded like a man making a gift, since he [the debtor] is deemed to waive his defense. But if he promised the creditor in ignorance, he can use no defense against the creditor who is simply taking what is his due. But the person making the delegation is liable to *condictio*, for an uncertain amount if the money is not yet paid, for a specific sum if it has been paid, and so, should he himself have provided the money, he can bring the action on mandate.

13 ULPIAN, *Edict, book 38:* If I delegate to my creditor as being my debtor one who is not so, the latter will have no defense; but a *condictio* will lie against the person making the delegation.

14 ULPIAN, *Disputations, book 7:* Whenever what is due simply is promised conditionally by way of novation, novation does not result forthwith but only when the condition is realized. Hence, if Stichus were the object of the obligation and died while the condition was pending, novation would not occur, because the thing would not subsist at the time that the condition was satisfied. Accordingly, Marcellus is of the opinion that even if, after culpable delay, Stichus be made the object of a conditional obligation, the delay is purged and does not carry into the subsequent obligation. 1. Should, however, a person stipulate without qualification, with a view to novation, for what is due under a condition, he still does not novate at once, although the unqualified stipulation appears to have effected something; but he will novate when the condition is realized; the satisfied condition makes operative the first stipulation and transfers it into the second. Thus, should the promisor be deported while the condition is pending, Marcellus writes that not even on the realization of the condition would novation be effected because, at the time that the condition is fulfilled, there is no one who is under obligation.

15 JULIAN, *Digest, book 13:* Should a creditor stipulate for a penalty if the money is not paid on time, that stipulation is not made operative by novation.

16 FLORENTINUS, *Institutes, book 8:* A slave cannot novate, without his master's consent, even an obligation of the *peculium*, rather does he add an obligation than novate the earlier one.

17 ULPIAN, *Edict, book 8:* One who cannot speak may delegate his debtor in writing or by signs.

18 PAUL, *Edict, book 57:* Mortgages and pledges are released by a lawfully made novation, and interest does not run.

19 PAUL, *Edict, book 69:* A defense of bad faith which could be raised against the person delegating has no place against the creditor to whom the delegation is made. The same holds good of other similar defenses, even of that given to a son-in-power under the *senatus consultum* [*Macedonianum*]; for against the creditor to whom he is delegated by the person who lent the money contrary to the *senatus consultum*, he cannot invoke the defense because there is no breach of the *senatus consultum* in his promise; moreover, he cannot recover what he may have paid. The case is different with a woman who gives an undertaking contrary to the *senatus consultum* [*Velleianum*] for her second promise is also intervention for another. So also with a *minor* who, being overreached, is delegated because, if he still be a *minor*, he is again overreached; it would be different if he has now passed the age of twenty-five, although he could still have *restitutio in integrum* against his first creditor. But defenses are refused against the second creditor because, in private contracts and agreements, it is not easy for the claimant to know the dealings between the delegate and the debtor, and even if he does know, he should dissimulate, not to appear inquisitive; accordingly, a defense arising from the person of the debtor will rightly be refused against him.

20 PAUL, *Edict, book 72:* We can novate in person, if we are independent, or through those who stipulate by our will. 1. A *pupillus* cannot novate without his tutor's authority; a tutor can, if it be to the advantage of the *pupillus*, so too a general manager [of another's affairs].

21 POMPONIUS, *From Plautius, book 1:* If I bid my debtor to pay you, you cannot novate that at once by stipulation, although the debtor will be released by paying you.

22 PAUL, *Plautius, book 14:* Should someone, in my absence, stipulate from my debtor with a view to novation and I subsequently ratify the transaction, I novate the obligation.

23 POMPONIUS, *Plautius, book 3:* A son-in-power cannot novate his father's right of action without the latter's knowledge.

24 POMPONIUS, *From Plautius, book 5:* Novation cannot be effected by a stipulation which does not become operative. It in no way conflicts with this that if I should, intending novation, stipulate under a condition from Titius what Sempronius owes me and Titius dies while the condition is pending, novation does occur, the condition being fulfilled before the inheritance is accepted; for here the stipulation is not extinguished by the promisor's death but passes to the heir whose person the inheritance meanwhile represents.

25 CELSUS, *Digest, book 1:* And so no one can validly novate the old obligation because in the interim valid performance is made; for valid payment may meanwhile be made to those in our power of what they have advanced, since none of them can of himself lawfully novate the earlier obligation.

26 CELSUS, *Digest, book 3:* Suppose that someone, owed ten by Titius and fifteen by Seius, stipulates from Attius that what one or the other owes should be given to him; neither obligation is novated, but it is in the power of Attius to pay for whichever he choose, and he will release him. Now we suppose that the intention was that he should give one or the other; for otherwise, he is regarded as stipulating for both and novating both, if that was the intention.

27 PAPINIAN, *Replies, book 3:* A purchaser, on the vendor's delegation, promises the money thus: "whatever ought to be given or done on the sale"; novation following, he will owe no interest for either subsequent period.

28 PAPINIAN, *Definitions, book 2:* I stipulate for the Cornelian estate and subsequently stipulate for the value of the estate. There will be no novation if the second stipulation

was not made for that purpose, but the second stipulation will be binding under which the money not the land is due. Hence, if the promisor hands over the land, the second stipulation is not extinguished at law nor if issue is joined on the first stipulation. Finally, whether the land has subsequently improved or deteriorated without fault on the debtor's part, the value current when the land is claimed will rightly be taken; but in the case of the second stipulation, it will be its value as at the time of the stipulation.

29 PAUL, *Questions, book 24:* There are many illustrations that voluntary novation is one thing, accepting litigation another. The privilege of dowry or tutelage is lost, if, after divorce, the dowry be brought into stipulation or the right of action on tutelage is novated after puberty, provided that that is specifically intended. No one says this of joinder of issue. And in bringing actions, we make our position not worse but better as is said of those actions which can be ended by lapse of time or by death.

30 PAUL, *Replies, book 5:* Paul's answer was: If a creditor so stipulate from Sempronius, with a view to novation, that the former obligation is totally departed from, the same things cannot be put under obligation from the later debtor without the consent of the first.

31 VENULEIUS, *Stipulations, book 3:* Should I stipulate for something to be given and stipulate under a condition for the same thing from the same person with a view to novation, the thing must continue to exist for the novation to be operative, unless it be the promisor's fault that he does not give it. Hence, if you ought to give me a slave and you are in culpable delay in giving him, you will be liable still, if the slave dies. And if, before he dies, you being already in delay, I stipulate from you for the same slave and he dies and then the condition is realized, there will be novation, since you are already obliged by stipulation to me. 1. Put the case that two people stipulate; the question is whether one has the right to novate and what right each acquires for himself. Now it is generally agreed that performance may validly be made to one, that one by bringing action brings the whole matter into issue, and that formal release by either destroys the obligation of both from which it can be gathered that each acquires [the right] for himself as if he had stipulated alone, except that he may lose a debtor through the act of his co-stipulator. Accordingly, if one of them stipulate from someone, he can, by novation, release also from the other, assuming the intent to novate, the more so since we regard such stipulation as akin to performance. Else what do we say if one delegate to his creditor their common debtor and [the creditor] stipulates from him or a woman bids [her debtor] to promise land to her husband as dowry or a bride-to-be promises it herself as dowry? The debtor will be released from both.

32 PAUL, *Neratius, book 1:* You ought to give me a slave and Seius [ought to give me] ten. I stipulate from one of you, by way of novation, "what you or Seius ought to give"; both obligations are novated. PAUL: rightly so, because both are brought into the later stipulation.

33 TRYPHONINUS, *Disputations, book 7:* Titius, wishing to make me a gift, having been delegated by me to my creditor, promised on the latter's stipulation; he will not have against the creditor the defense that he be condemned only for what he can afford. He would validly have that defense against me because I was claiming a gift from him; the creditor, however, seeks what is his due.

34 GAIUS, *Verbal Obligations, book 3:* It should not be doubted that a son-in-power or slave, granted administration of the *peculium*, has the right to novate debts of the *peculium*, that is, if they stipulate themselves and especially if they improve their position thereby. Should they bid another to stipulate, it matters whether they bid

that other to stipulate as a gift or as conducting affairs for the son or slave; in the latter case, an action on mandate is acquired for the *peculium.* 1. There is no room for doubt that the agnate of a lunatic or the curator of a spendthrift has the right to novate if it be to the lunatic's or spendthrift's advantage. 2. Above all, we should be aware that nothing prevents several obligations being novated by one stipulation; for instance, we stipulate: "Do you solemnly promise to give what Titius and Seius ought to give me?" For though each was separately under obligation, both are released by virtue of the novation, since the obligation of each merges in the person from whom we now stipulate.

3

PERFORMANCES AND RELEASES

1 ULPIAN, *Sabinus, book 43:* Whenever a debtor under several heads pays one debt, it is in his choice which debt he wishes to discharge and the one he names will be discharged; for we are able to state terms on what we pay. But every time that we do not specify which is being paid, it is the recipient who may elect to which debt he will allot it, provided that he effects a discharge for that for which he would himself be discharged if he were in debt and would be exonerated from the debt; in short, a debt which is not the object of dispute or one for which someone had gone surety for another or one the date for payment of which has not yet arrived; for it has appeared most equitable that the creditor should administer the debtor's affair as he would his own. The creditor, therefore, is allowed to opt which debt is paid, so long as he decides as he would in his own concern, and to decide as in the present state of affairs, that is, as soon as the payment is made.

2 FLORENTINUS, *Institutes, book 8:* While this happens in the conduct of the matter, the creditor is free not to accept [the money] or not to grant to the debtor his wish over other [debts] in respect of what was paid under a different head.

3 ULPIAN, *Sabinus, book 43:* But it is not allowed later. This brings it about that he is seen always to have to ascribe it to the greater debt, and so he decides on his own debt. 1. If it should chance that neither says anything, the payment will be deemed, where there are debts with a time for payment, to be of that one for which the time has fallen due,

4 POMPONIUS, *Quintus Mucius, book 13:* and, further, what I owe on my own account rather than what I owe as another's surety, and rather a debt with a penalty clause than one without, also a debt which I owe with security rather than an unsecured debt.

5 ULPIAN, *Sabinus, book 43:* Among debts presently due, it is settled that whenever it is unclear which is being paid, the payment is attributed to the more onerous and, if none is more onerous, that is, if all are similar, the longest standing. A debt is regarded as more onerous which is due with security rather than one which is unsecured. 1. If a person give two sureties, he can pay in such a way that he releases one of them. 2. Our Emperor Antoninus with his deified father gave a rescript that when the creditor, having sold the pledges, calls in the money, if there be interest due and other interest which is not due, what is in respect of interest goes to both types, that due and that which is not presently due. Suppose that some interest is due on a stipulation and other interest due naturally on a simple agreement; if the amount of

interest legally due and not legally due be not the same, what is paid goes to both accounts equally, not in proportion, as the wording of the rescript suggests. But if the interest perchance be not due and someone make an unqualified payment of interest which had in no way been stipulated for, the Emperor Antoninus and his deified father ruled in a rescript that it goes to the capital debt. In the same rescript, there is further written: "Since it is generally settled that money paid is first to be attributed to interest, there is deemed to be set off to that interest what the debtor is obliged to pay; and just as what is given under the agreement of a pact cannot be recovered, so, under their own head, what is not paid is not regarded as having been paid in discharge by reason of the choice of the recipient." 3. According to Marcellus, in the twentieth book of his *Digest*, this question is raised: A person goes surety for a debtor "that he commits himself for principal and interest"; does he commit himself proportionately for interest and principal or rather first for interest and then, if there be any surplus, for principal? For myself, I do not doubt that this undertaking for "principal and interest" first applies to interest and then, should there be anything over, to principal.

6 PAUL, *Plautius, book 4:* For one looks not to the order of the document; rather is there adopted by law what the parties appear to have intended.

7 ULPIAN, *Sabinus, book 43:* If something be due on a shameful ground and on one not shameful, that debt is regarded as paid which derives from the shameful cause. Similarly, if there be something due by reason of a judgment and also not on a judgment, I think that the debt paid is that on a judgment, a view shared by Pomponius. Hence, if a debt be due on a ground which produces an increased award if the defendant denies liability or on a penal ground, it must be said that payment releases the penal debt.

8 PAUL, *Sabinus, book 10:* Pomponius says that it has not inelegantly been written that if, in the matter of time due and of contract made, there is equality, payment is regarded as made proportionally in respect of all sums.

9 ULPIAN, *Sabinus, book 24:* I stipulated for payment to me or to Stichus, the slave of Sempronius. Payment cannot be made to Sempronius, even though he is the slave's master. 1. One who owes ten is released in part from his obligation by paying part and only the balance of five remains due; likewise, one who owes Stichus remains liable for the remainder, having given Stichus in part. But one who should give a slave nonetheless owes the slave, even having given a share in Stichus; and, indeed, the remainder of the slave can be claimed from him. However, if the debtor gives up the rest of Stichus or it is the claimant's fault that he does not accept, the debtor will be released.

10 PAUL, *Sabinus, book 4:* I stipulate thus: "to me or to Titius"; Titius cannot sue, novate, or make a formal release; but the amount can be paid to him.

11 POMPONIUS, *Sabinus, book 8:* If I stipulate, "to give to me or to my *pupillus*," the promisor, by paying the *pupillus* without the tutor's [my] authority, will be released from me.

12 ULPIAN, *Sabinus, book 30:* Payment is validly made to a genuine procurator. Now we accept as a genuine procurator one who has either been given a special mandate or been entrusted with the administration of affairs generally. 1. It sometimes happens, though, that valid payment is made to a nongenuine creditor, one, for instance, whose name is inserted when a person stipulates for himself or for Titius. 2. Again, suppose that someone gave a mandate to pay Titius and then forbade the latter to accept; if I pay him in ignorance of the ban, I will be released; but I will not be, if I know of the ban. 3. The case is different if you postulate to me that someone stipulates for himself or Titius; for even if he [later] forbid me to pay Titius, I shall be released by such payment because the stipulation has a specific provision which the stipulator cannot alter. 4. But even though payment be not to a genuine procurator but the principal ratifies the payment, there will be effective release since ratification is likened to mandate.

13 JULIAN, *Digest, book 54:* The principal, however, must ratify as soon as he knows of it and that broadly; and when acceptance must be made with the passage of some time, as in the case of a legacy, then, when there is a question of rejection, some space of time is to be adopted, neither the minimum nor the maximum, which can be sensed by reason rather than be expressed in words.

14 ULPIAN, *Sabinus, book 30:* But suppose that someone so pays that if there be no ratification, he will have a *condictio*; if the principal does not ratify the payment, the payer will have a *condictio*. 1. There are indeed tutors who are styled honorary; they are granted thanks to cognizance of the issue; there are those granted to act and either the head of household adds that, say, one should act or the administration is entrusted to one by the will of the tutors; alternatively, the praetor so rules. Accordingly, I say that to whichever tutor payment be made, even honorary ones (for the risk attaches also to them), the payment is lawfully made, unless they be prohibited from administration by the praetor. 2. But if a man pays the one removed from the office of tutor, he pays one who has ceased to be a tutor, and so he will not be released. 3. What, then, if he pay to a tutor in whose place a curator is to be appointed, for instance, a tutor relegated in perpetuity or for a period? I say that if he pays him before the curator has been appointed, he should be released. 4. But even if he pays to one absent on state business, he makes a valid payment, indeed, to one not present, so long as another has not been appointed in his place. 5. Whether [the tutors] be statutory, testamentary, or appointed after an investigation, payment to even one of them is valid. 6. We must consider whether valid payment is made to one granted by reason of his repute because he is granted to advise his fellow tutors; still, since he is a tutor, I think that release follows unless payment to him was forbidden. 7. Payment may also be validly made to the curator of a lunatic, to the curator of one who, by reason of his age or on some other ground, cannot act for himself, or to the curator of a *pupillus*; that is settled. 8. It is obvious that a *pupillus* cannot make effective payment without his tutor's authority; even if he hands over the coins, he does not make them the property of the recipient and a *vindicatio* may be brought for them. Of course, if they have been spent, he will be released.

15 PAUL, *Sabinus, book 6:* Payment may not be made to a *pupillus* without his tutor's authority, nor can [the *pupillus*] delegate, because there is nothing that he can lawfully alienate. But if the debtor should pay him and the coins remain intact, the debtor will defeat the *pupillus*, should the latter claim the debt with the defense of bad faith.

16 POMPONIUS, *Sabinus, book 15:* If a formal release be granted to a conditional debtor, he is deemed to have been already released when the condition subsequently materializes. Aristo used to say that this also happens if the performance be in kind; for he wrote that if someone promise money under a condition and give over the money with the provision that if the condition be fulfilled, it shall be treated as payment, it is no obstacle to his release, when the condition materializes, that he has already made the money the creditor's.

17 POMPONIUS, *Sabinus, book 19:* Cassius says that if I give money to someone to pay to my creditor and he pays it in his own name, neither of us is released, not I, because the payment was not in my name, not he, because he gave another's money; but he will be liable [to me] in the action on mandate. Should the creditor, however, without bad faith spend the coins, the person in whose name they were paid over will be released lest, if a different view were taken, the creditor should make a profit.

18 ULPIAN, *Sabinus, book 41:* Suppose that someone makes payment to a slave appointed for the collection of money, after the latter's manumission; if he do so under his contract with the master, it will be effective because he is unaware of the manumission. Even if it were in respect of some matter relating to the *peculium*, then, although he be aware of the manumission, he will be released, provided that he be unaware that the *peculium* has been taken away [from the freedman]. In either case, however, if the freedman so acted with a view to appropriation, he would commit theft

against the master. Again, if I give my debtor a mandate to pay Titius and then forbid Titius to take the money and, unaware of this, the debtor pays Titius who pretends to be [my] procurator, the debtor will be released, and Titius will be liable for theft.

19 POMPONIUS, *Sabinus, book 21:* My runaway slave, while conducting himself as though he were a freeman, advanced to you coins which [he had] stolen from me; Labeo says that you come under obligation to me and that should you pay him in the belief that he is a freeman, you will be released from me. [He says further that] if you paid someone else, whether on his instruction or with his subsequent ratification, you will not be released because, in the former case, the coins had become mine and the performance is seen as if to me. Hence, my slave, by exacting what he had advanced out of his *peculium*, will release the debtor; but he does achieve the same result by delegation or novation.

20 POMPONIUS, *Sabinus, book 22:* If I make over to you my thing which is due to you but which is pledged for another debtor, I will not be released because the thing can be taken away from you by the pledgee.

21 PAUL, *Sabinus, book 10:* Suppose that having stipulated for ten from Titius, you then stipulate from Seius for whatever you do not obtain from [Titius]; although you claim ten from Titius, Seius will not be released. For what if Titius, when condemned, can do nothing? But, equally, if I proceed first against Seius, Titius is in no way released; for it is uncertain whether Seius will owe anything at all. In sum, if Titius should pay in full, Seius will be seen never to have been a debtor, because the condition of his obligation did not materialize.

22 ULPIAN, *Sabinus, book 45:* A son-in-power, without his father's consent, cannot release the latter's debtor; he can indeed acquire an obligation [for the father] but cannot extinguish one.

23 POMPONIUS, *Sabinus, book 24:* Without our knowledge or, indeed, consent, we can be released by performance or acceptance of proceedings on our behalf.

24 ULPIAN, *Sabinus, book 47:* When a surety stands for two people for ten, he is liable for twenty, and whether he pays twenty or ten, he releases both debtors. But we must consider which he releases if he pays five; in the case of five, he will be relieved for whom the transaction took place, or if that be not apparent, we must look to the longer standing debt. So also if fifteen be paid; but if it be in fact apparent what was the transaction, then there will be relief for one for ten, for the other for five; if it be unclear, there will be relief on the older contract for ten and for five on the other.

25 POMPONIUS, *Sabinus, book 31:* Should an heir instituted to a share pay in full the ten which the deceased had promised, he will be released in respect of the share [of the estate] to which he is heir and for the rest he has a *condictio*. But, if, before he brings his *condictio*, the remainder of the inheritance should accrue to him, he will be liable in respect thereof also, and so I think that his *condictio indebiti* could be met with the defense of bad faith.

26 POMPONIUS, *Sabinus, book 35*: If the creditor should sell pledged land and recover what was due to him, the debtor will be released; even if the creditor formally released the purchaser from [payment of] the price or stipulated from him, the debtor would nonetheless be released. But should it be a pledged slave who is sold by the creditor, the debtor will not be released so long as he may be the object of rescission [of the sale] any more than in the case of any other pledge sold, so long as the sale might be resolved.

27 ULPIAN, *Edict, book 28:* Equally, in respect of a stipulation or an action on a will, if a thing due be delivered, still, so long as there be any defect in the debtor's title, that thing can be claimed by action; for instance, although it has been made over to me, I can claim land if there be some surviving right of security.

28 PAUL, *Edict, book 38:* Debtors are released by payment to one conducting affairs as though tutor if the money arrive to the account of the *pupillus*.

29 ULPIAN, *Edict, book 38:* When Stichus and Pamphilus are promised to a slave

owned in common, Stichus cannot be given in satisfaction to one [master] and Pamphilus to the other; half shares in each are due [to both masters]. So also, if someone promised the giving of two Stichi or two Pamphili or promised to give ten slaves to the slave owned in common by two masters. For the expression "ten slaves" lacks clarity as does "ten denarii." The half share of each thing can be interpreted in two ways; but in the case of coins, oil, grain, and the like, which share a common form, it appears the intention that the obligation is to be divided by number, that being more advantageous to both the promisor and the promisees.

30 ULPIAN, *Edict, book 51:* Should the creditor refuse to accept the money claimed when offered by the debtor, the praetor will refuse him an action.

31 ULPIAN, *Disputations, book 7:* Among craftsmen, there is a wide distinction of intelligence, nature, education, and experience. Accordingly, if someone promise personally to build a ship or a house or to dig a ditch and it be specifically provided that he exert his own labor on it, his surety, by himself building or digging the ditch, will not release the promisor, unless he has the consent of the stipulator. Accordingly, also if there be a surety for such stipulations as these, "that it shall not be your fault that I do not have the right to pass and drive [cattle]," the surety, by prohibiting passage, does not make the stipulation operative, and if he manifest tolerance, he does not prevent the stipulation from becoming operative.

32 JULIAN, *Digest, book 13:* Suppose that a slave makes an advance in respect of the *peculium* and the debtor, unaware that the master has died, pays the slave before the inheritance has been entered upon, [the debtor] will be released. The same is true even if a debtor pay the money to a manumitted slave, not knowing that his *peculium* has not been granted to him; and it will be of no consequence whether the money be paid when the master is still alive or dead. For in the latter case also, the debtor will be released, just as one bidden by his creditor to pay money to Titius will make a valid payment to Titius although the creditor has now died, so long as he is unaware of the creditor's demise.

33 JULIAN, *Digest, book 52:* A man who stipulates that land be given to himself or to Titius will still have an action, even though the land be given to Titius, if it be subsequently evicted, just as would he who stipulated for a slave and the promisor gave to Titius a *statuliber* who came to freedom. 1. Should a person have promised that Stichus or Pamphilus will be given, if he should have wounded Stichus, he will no more be released on giving him than if he had promised Stichus alone and, having himself wounded him, gave [Stichus]. Similarly, one who promises the giving of a slave and offers one whom he has wounded will not be released. Again, proceedings having been instituted, if the defendant offers a slave whom he has wounded, he will be condemned; should he give a slave wounded by someone else, he will be condemned, since he could give another one.

34 JULIAN, *Digest, book 54:* Someone promised that ten or a slave would be given to you or to Titius; should he have given a share in the slave to Titius and then paid over ten to you, it is against you, not Titius, that he will have a *condictio* for the share of the slave, as though having performed what was undue, by your will, to Titius. The law will be the same if he pays the ten after the death of Titius; it is against you, rather than the heir of Titius, that he will have a *condictio* for the share of the slave. 1. Suppose that two promisees ask that a slave be given and that the promisor gives each a share in diverse slaves; there is no doubt that he is not thereby released. But if he should give each shares in the same slave, release will result, because the common obligation has the effect that what is performed to two is deemed performed to one. And, contrariwise, when two sureties promise the giving of a slave, they are not released by giving shares in diverse slaves; but if they give shares in the same slave, they are released. 2. I stipulate that a slave or ten be given to Titius; if the slave be given to Titius, the promisor is released as against me; but before the slave is delivered, I can sue for the ten. 3. Should I put Titius in charge of all my affairs and then

revoke his authority, if the debtors be unaware of the fact, they will be released by paying him; for one who puts someone in charge of all his affairs is deemed to authorize debtors to make payment to his procurator. 4. Should a debtor, without intervening mandate, erroneously believe himself to pay the money at my wish, he will not be released. Hence, no one will be released by paying a procurator who of his own accord presents himself for another's business. 5. And it has been the legal answer that when a runaway slave, posing as free, sells something, the purchasers are not, by paying the slave, released from his master. 6. Should a son-in-law, in the ignorance of the daughter [wife], pay back the dowry to his father-in-law, he will not be released; but he may bring a *condictio* against the father-in-law, unless the daughter ratifies the transaction. Indeed, the son-in-law is very similar to one who pays the procurator of an absent party because the daughter is a participant in the matter of dowry and, as it were, a partner with her father. 7. I bid my debtor to pay money to Titius, intending a gift to the latter; although Titius accepts, intending the coins for my account, nonetheless, the debtor is released. But if Titius subsequently gives me the same money, the coins become mine. 8. Someone instituted heir a son-in-power from whom he had accepted a surety; the question was asked, assuming that he accepted the inheritance at his father's direction, whether the father could sue the surety. I replied that whenever one liable to make satisfaction becomes heir to the one to whom satisfaction should be made, sureties are thereby released because no one can be liable for and to the same person. 9. Should a usurper restore what he has exacted from the debtors of the inheritance to the claimant of the inheritance, the debtors will be released. 10. If I stipulate for ten or a slave and I accept two sureties, Titius and Maevius, and Titius pays five, he will not be released until Maevius also pays five; should Maevius make over a share in the slave, both remain under obligation. 11. One who can defend himself by a permanent defense recovers what he pays, and so the debt is not discharged. Hence, if one of two promisors delay so that payment may not be claimed from him, then, although he pay, nonetheless, the other remains under obligation.

35 ALFENUS VARUS, *Digest, Epitomized by Paul, book 2:* What a slave may have advanced or deposited from his *peculium* may be lawfully restored to him, whether he has been sold or manumitted, unless any ground intervene in respect of which it can be seen that the person in whose power he formerly was is unwilling that payment be made to him. Even if the slave should have lent his master's money at interest, then, if the slave conducted his master's affair with the latter's permission, the same is to be said; for he is to be seen as contracting business with the slave with the master's consent and can receive from or pay to him.

36 JULIAN, *Urseius Ferox, book 1:* Suppose that my head of household die, leaving his wife pregnant, and that as heir, I claim all that was due to my father; there are those who think that I have made an end of nothing, if no issue be born, and that I acted correctly because, in the nature of things, it is true that I am sole heir. JULIAN notes: The more correct view is that I will have lost the share for which I was instituted before it was certain that there would be no further issue; or a quarter, since triplets can be born, or a sixth, since there could be quintuplets. For Aristotle also says that a woman's private parts can accommodate as many; further, there is a woman at Rome, who hails from Alexandria in Egypt, who bore five children, at one birth, who survived, and in Egypt. I received confirmation of this.

37 JULIAN, *Urseius Ferox, book 2:* Whenever one of the sureties has paid his share [of the debt] as acting on behalf of the debtor, the matter is to be treated as if the debtor himself had paid the share of the one surety, not, however, so that there is a departure from the principal sum due, but only that surety alone is released in whose name payment was made.

38 AFRICANUS, *Questions, book 7:* When someone stipulates that something be given to himself or to Titius, he [Julian] says that it is better that it be said that payment may lawfully be made to Titius in the given circumstances, that is, that he remain in the same position that he was when the stipulation was made; but should he have been adopted, gone into exile, been interdicted from fire and water, or become a slave, it is to be said that lawful payment may not be made to [Titius]; for there appears to be in the stipulation the tacit agreement, "if he remain in the same legal position." 1. Should I bid my debtor pay Titius and then forbid Titius to accept and, unaware of this, the debtor should pay Titius, he thought that [the debtor] would be released if Titius accepted the coins without the intention to profit thereby. Otherwise, since he would commit theft of the coins, they would remain the property of the debtor and so the latter would not be automatically released at law; but it would be equitable that he should have the relief of a defense if he be prepared to make over to me the *condictio* for theft that he would have against Titius; the same applies if a husband, seeking to make a gift to his wife, bids his debtor to pay her; here again, the coins do not become the woman's property, and so the debtor is not released; but he will be protected against the husband by a defense, if he makes over to him the *condictio* that he would have against the wife. Further, in such a case, I would have an action for theft, after a divorce, since it was my concern that the coins be not appropriated. 2. An action on the *peculium* was brought against the [slave's] master; judgment going against him, he paid; [Julian] said that sureties accepted for the slave are also released and that a proof that the same money can be paid on several counts is that when security for satisfaction of a judgment is given and the defendant, defeated in the action, pays, he and his sureties are released not only from the action to enforce a judgment but also from the stipulation. And very similar is it that when the possessor of an inheritance, thinking himself heir, pays, the heir is not thereby released in that case because it happens that [the possessor] pays in his own name money not due from him and can reclaim it. 3. Should one who has promised a slave give a *statuliber*, I incline to the view that realization of the condition is not to be availed but that the creditor can sue and a *condictio* will lie to the promisor; but should the condition have failed, the latter will be released. In like manner, if he should deliver in error while the condition is pending and, before he brings his *condictio*, the condition should be realized, it cannot in a way be said that if Stichus be dead, when the condition is fulfilled, the debtor will be released although, if the condition failed during the slave's life, he will be released; for in our case, there is no time at which you have made the slave wholly mine. Otherwise, it would be like your delivering to me a slave in whom someone else has a usufruct and who dies while the usufruct is still running and your being regarded as released by your delivery of the slave; that is in no way to be approved any more than if you deliver a slave owned in common who dies. 4. Should a person go surety for one who, while absent on state business, was released by that action and then a year elapses, is the surety released? That did not commend itself to Julian and certainly if there were no possibility of proceeding against the surety. In such a case, the action should, under the edict, be restored against the surety, just as against a surety who kills a promised slave. 5. A man went surety for you to Titius and gave a pledge in respect of his own obligation; subsequently, he instituted you as his heir. Although you are not liable on the suretyship, nonetheless, the pledge remains under obligation. But if the same [surety] gave another surety and then instituted you his heir, [Julian] says that it is correctly to be held that the obligation for which he went surety being removed, the [second] surety is also released.

39 AFRICANUS, *Questions, book 8:* If, being about to pay money to you, I deposit it sealed up at your direction with a moneychanger until it has been approved, Mela writes in his tenth book that it will be at your risk. This is true, subject to the qualification that it should be particularly considered whether it is your fault that it is not approved forthwith; for then the position will be as though, when I am ready to pay, you for some reason are unwilling to accept in which case the risk will not always be yours. For what if I offered the money at an unsuitable time or place? Following from

this, I think that likewise, if the purchaser deposits the price and the vendor the goods, because they have little mutual trust, the money will be at the purchaser's risk (certainly, if he chose the depositee) and so also will the goods, because the purchase is complete.

40 MARCIAN, *Institutes, book 3:* Suppose that someone pays money to my creditor on my behalf, even without my knowing it, I will be entitled to the action on pledge [against the creditor]. Similarly, if someone pays off legacies, the legatees must go out of possession; otherwise, the interdict will become available to the heir to evict them.

41 PAPINIAN, *Adulteries, book 1:* When a man is charged with adultery, there is nothing to prevent lawful payment being made to him by his debtors in the period [before his trial]; otherwise, many would lack the necessary sustenance of the innocent.

42 PAUL, *Adulteries, book 3:* Nor is there seen to be any ban on the charged man paying his creditor.

43 ULPIAN, *Rules, book 2:* In all cases of release, ancillary obligations are also released, for example, sureties, mortgages, and pledges, except that where there is a merger of the sureties with the creditor, the principal debtor is not released.

44 MARCIAN, *Rules, book 2:* In cases of payment, it sometimes happens that two obligations are simultaneously extinguished by the one payment; for instance, if someone should sell a pledge to his creditor in the respect of the debt, it is the case that both the obligation on the sale and that on the debt disappear. Again, suppose that to a *pupillus* who accepted a loan without his tutor's authority, the creditor left a legacy on condition that he paid the sum, [the *pupillus*] will be seen as having paid on two counts, in respect of his own debt, so that it is imputed to the heir in the matter of the *lex Falcidia* and in respect of the condition, for the acquisition of the legacy. Again, if a legacy be left of the usufruct of a specific sum of money, it will be the case that by the one payment, the heir will be released under the will and that he puts the legatee under obligation to himself. It would be the same, if he were condemned to sell or let to someone; for by selling or letting, the heir both is released under the will and binds the legatee to himself under an obligation.

45 ULPIAN, *Replies, book 1:* He replied to Callippus that even though, on the wife's stipulation, a husband should promise that, at the end of the marriage, lands pledged for the dowry would be made over by him, nonetheless, it would meet the case that the value of the dowry be tendered. 1. He also replied to Fronto, a tutor continuing in the administration of the guardianship, that although he lay under a capital charge, what was genuinely due to the *pupillus* could be paid to him.

46 MARCIAN, *Rules, book 3:* Should someone make over to a willing recipient one thing instead of another and the thing [delivered] be evicted, the original obligation stands. Even though the eviction be partial, the liability in full remains; for the creditor did not receive it, the matter being unitary, unless it become wholly his. 1. But if, say, he gave two estates in respect of the debt, the obligation would remain intact, if one of them were evicted. For a thing made over in respect of something effects release only when it becomes fully the property of the recipient. 2. Again, if someone dolosely should give land worth less by way of performance, he will not be released unless he makes up the balance.

47 MARCIAN, *Rules, book 4:* Should the question arise, where payment has been made to a *pupillus* without his tutor's authority, at what time he has become enriched, the time of the proceedings is to be looked to; equally, the time of proceedings is to be looked to for a defense of bad faith to be set up against him. 1. Naturally, as Scaevola used to say, even if the thing perish before joinder of issue, he will be regarded as having been enriched in the interim, that is, if he buy a necessary thing which he would have bought by reason of his needs; for, by the very fact that he is not made poorer, he is enriched. Similarly, he thought that the *senatus consultum Macedonianum* did not apply to a son-in-power, if the letter accepted a loan for necessary purposes and lost it.

48 MARCELLUS, *Replies, sole book:* When Titia took possession of her husband's

property in respect of her dowry, she did everything as proprietrix, demanding payments and selling movables; my question is whether what she realizes from her husband's estate is to be attributed to her dowry. Marcellus replied that the proposed ascription should not be considered unfair; for what the woman acquires from that source should rather be regarded as taken in discharge. But should it be the case that the adjudicator on the recovery of the dowry should take interest into account, the computation should be on the basis that according as anything comes into the woman's hands, it does not reduce the whole sum due but is first applied in respect of the amount that she should obtain by way of interest, which is not unfair.

49 MARCIAN, *Action on Mortgage, sole book:* We regard money as paid naturally when it is paid to the creditor. But, equally, if, at the creditor's direction, it is paid to someone else, his own creditor or future debtor or to someone to whom he wishes to make a gift, [the debtor] must be discharged. Again, if the creditor ratifies the payment, the same must be said. A payment will also be valid if made to a tutor, curator, procurator, or any successor or to a slave agent. But if a formal release [from the debt] be made in the case of a hypothec charged in respect of a stipulation or accepted without stipulation, the term "performance" is inapplicable; the expression is "satisfaction."

50 PAUL, *Sabinus, book 10:* I promise you gold and then, you being unaware of the fact, I give you copper as being gold; I will not be released, but I cannot recover [the copper] as not being due because I acted deliberately. However, I will be able successfully to resist your claim for the gold, if you do not return the copper which you accepted.

51 PAUL, *Edict, book 9:* Payment is validly made to a cashier who, unknown to the debtor, has been removed from office; for he is paid with the consent of the master, and if the payer does not know that the master has changed his mind, he will be released.

52 ULPIAN, *Edict, book 14:* Satisfaction is tantamount to performance.

53 GAIUS, *Provincial Edict, book 5:* It is permissible for anyone to pay on behalf of another who is unaware of or indeed unconsenting to the act; for it is established at civil law that the position of an ignorant or unconsenting person may be improved.

54 PAUL, *Edict, book 56:* The term "performance" pertains to any release, however effected, and relates to the substance of the obligation rather than to the payment of coins.

55 ULPIAN, *Edict, book 61:* One who pays on such terms that he may recover is not released as coins are not transferred which are so given that they may be got back.

56 PAUL, *Edict, book 62:* One who authorizes performance is deemed himself to perform.

57 ULPIAN, *Edict, book 77:* To one who stipulates for "ten in honey," honey indeed can be given before any action is brought on the stipulation; but once the action has been brought and ten claimed, honey can no longer be given in performance. 1. Similarly, if I stipulate that something be given to myself or to Titius and then I claim, performance can no longer be made to Titius; it could, though, before joinder of issue [on my claim].

58 ULPIAN, *Edict, book 80:* Suppose that someone makes performance to one presenting himself in good faith in another's affairs; when will he be released? Julian says that it is when the principal ratifies the transaction that he will be released. He also asks whether [the maker of the performance] can have a *condictio* on the matter before the principal's ratification and says that here it is relevant to know with what intention the performance was made; was it that the debtor be released at once or only on the principal's ratification? In the former case, a *condictio* can be brought forthwith against the procurator but will no longer lie when the principal ratifies the transaction; but in the latter case, the *condictio* will lie only when the principal does not ratify. 1. Suppose that a creditor to whose procurator, without his knowledge, performance is made gives himself in adrogation; if his [new] head of household ratifies what was done, the

performance is validated; if he does not, the debtor can recover. 2. If there be two people who take a stipulation and performance be made to the procurator of one in the latter's ignorance and, before he has ratified it, performance is made to the other, both the former and the second performance are in suspense; for it is uncertain whether he will exact what is or what is not due.

59 PAUL, *Plautius, book 2:* If I stipulate, "do you solemnly promise to give to me or to Titius," and the debtor [later] undertakes to perform to me, then, although I will get an action on the undertaking (*constitutum*), he can still perform to the other [Titius]. Again, should I stipulate from a son-in-power for me or Titius, the father can pay to Titius what is in the *peculium*, if, of course, he chooses to perform in his own name, not that of the son; for performance to the adjunct is deemed performance to me. Hence, Julian thinks that should what is not due be paid to the adjunct, a *condictio* can lie against the stipulator; it matters not whether I bid you pay Titius or whether the stipulation was so conceived from the outset.

60 PAUL, *Plautius, book 4:* One who gives another's slave by way of performance will be released by the usucapion of the slave.

61 PAUL, *Plautius, book 5:* Release forever will apply whenever what I owe you comes into your possession and you lack nothing and what is given cannot be recovered.

62 PAUL, *Plautius, book 8:* In my will, I gave my cashier his freedom and bequeathed his *peculium* to him; he exacted money from [my] debtors after my death; the question is: Can my heir retain out of the *peculium* what [the cashier] exacts? Now, if, indeed, it be after the inheritance has been accepted that he exacts the money, there should be no doubt that no retention should be made from the *peculium* on that score because, having become free, he himself becomes a debtor [to the heir], if debtors are released by payment to him. But should the cashier, before the inheritance is accepted, accept money, then, if their payment discharges the debtors, there is no doubt that retention thereof from the *peculium* is to be made because [the cashier] then incurs liability to the heir by the action for unsolicited administration or that on mandate. If, however, the debtors are not thereby released, this question does arise. When, in conducting my affairs, you accept payment from my debtors, I do not ratify and presently wish to bring the action for unsolicited administration; can I successfully so proceed, if I undertake your indemnity? I for one think not; for the action for unsolicited administration is excluded by my nonratification, and thereby a debtor to me is created.

63 PAUL, *Plautius, book 9:* If the debtor has a usufruct in a slave, the slave himself can obtain his discharge by a formal release; for [the debtor] is deemed to acquire it through his act. We say the same if there be a pact [not to claim].

64 PAUL, *Plautius, book 14:* When, at my direction, you pay to my creditor what you owe me, both you are released from me and I from my creditor.

65 POMPONIUS, *Plautius, book 1:* If the daughter of a lunatic divorce her husband, it is said that the dowry may be returned either to the agnate curator with the daughter's consent or to the daughter with the agnate's consent.

66 POMPONIUS, *Plautius, book 6:* Should the debtor of a *pupillus*, at the latter's direction but without his tutor's authority, pay money to the creditor of the *pupillus*, he does indeed discharge the *pupillus* but himself remains under obligation [to the *pupillus*]; he will, though, have a defense to safeguard himself. But if, in fact, he should not be a debtor to the *pupillus*, he has no *condictio* against the latter, who cannot incur an obligation without his tutor's authority, nor one against the creditor with whom he contracted at another's behest. Still the *pupillus* has been enriched in that he is released from the debt and will be liable to an *actio utilis*.

67 MARCELLUS, *Digest, book 13:* Should a man promise two slaves and deliver Stichus, he can be released by giving Stichus after again recovering ownership of him. In the case of coins, less or about the amount, there is no hesitation; for Servius, in [the works of] Alfenus, replied that he who is willing to accept less from his debtor and to release him can do so by receiving some coins from him, returning them and taking

them back again, for instance, if the creditor wish to release his debtor, having accepted ten from him, when a hundred be due, by returning them and accepting them again until he finally keeps them; still some have wrongly brought this to a matter of doubt on the ground that one who accepts, to return to the person from whom he accepts, is a payer rather than ceases [to be a creditor].

68 MARCELLUS, *Digest, book 16:* Put the case that a slave is directed to give ten to a *pupillus* and to be free; whether the *pupillus* be an heir or the condition pertain solely to [the slave], will [the slave] gain his freedom by giving to the *pupillus* even when the latter's tutor is not present? You are moved by consideration of the condition which consists in an act, for example, "if he shall have been slave to the *pupillus*," which can be realized even without the intervention of the tutor. And what, you say, if there be a curator and [the slave] be directed to give to the lunatic, will he get freedom by paying the curator? And suppose that land is bequeathed to someone if he shall have given to the *pupillus* or to the lunatic. It should be known that in all these cases, effective payment is made to the tutor or the curator; but payment is not correctly made to [the beneficiaries] themselves, that is, the *pupillus* or the lunatic, lest what is given be lost through their weakness; for the testator did not intend that the condition be regarded as satisfied by any form of giving.

69 CELSUS, *Digest, book 24:* Should you give in noxal surrender a slave in whom someone has a usufruct or who is in pledge to Titius, the person to whom you are condemned can have against you the action to enforce a judgment; we do not wait to see whether the creditor will evict. But if the usufruct should come to an end or the pledge obligation be dissolved, I think that release will follow.

70 CELSUS, *Digest, book 26:* What is promised for a certain day may indeed be given at once; for the whole intervening period is regarded as open to the debtor for paying.

71 CELSUS, *Digest, book 27:* When, having stipulated for ten for me or for Titius, I receive five, the promisor will validly give the other five to Titius. 1. Should a surety pay the procurator of his creditor and this latter ratify the payment after the time at which the surety could be released, nevertheless, because the surety paid at a time when he was still liable on the suretyship, he cannot recover, and he can proceed against the principal debtor by the action on mandate no less than if he had paid [the creditor] in person. 2. Likewise, if a creditor, unaware of a payment to his procurator, should give a formal release to the slave or son of his debtor but later, hearing [of the payment], ratify it, the payment is confirmed and the formal release of no consequence; conversely, if he does not so ratify, the formal release is confirmed. 3. But if, unaware of the payment, he should have joined issue and should ratify [the payment] while the case is pending, the defendant is to be absolved; should there be no ratification, condemned.

72 MARCELLUS, *Digest, book 20:* Suppose that one owing ten offers the money to his creditor who unreasonably refuses to accept and then the debtor, without fault on his part, loses the money, he can protect himself by the defense of bad faith although, when called upon to pay, he does not do so; it is quite unfair that he should be answerable when the money is lost because he would not have been liable, if the creditor had been willing to accept. Hence, there should be deemed to be payment of that over the acceptance of which the creditor was in culpable delay. And certainly, if a slave were comprised in a dowry and the husband offered him and then the slave died or if the husband offered money, which the wife refused and then he lost the money, the husband would be automatically free from liability. 1. When you had to give me Stichus and were in culpable delay over his delivery, you promised him subject to a condition; while it was pending, Stichus died; let us consider whether, since the earlier obligation cannot be novated, there lies the claim for the slave which would have lain, had the stipulation not intervened. There is to hand the counterpoint that the debtor, in promising conditionally on the creditor's stipulation, did not appear as withdrawing from the delivery of the slave; for it is true that one called upon who declines to give re-

leased the offeror from any further risk. 2. But what if, the debtor being unaware of the fact, the creditor should stipulate for the slave from someone else? Here again the debtor is to be deemed to be freed from risk just as if, when anyone offered the slave in [the debtor's] name, the stipulator refused to accept. 3. The reply will be the same if someone, when his slave is stolen, should take a conditional stipulation for whatever the thief ought to give or do; for the thief is released from a *condictio* if the owner refuses to accept the slave offered to him. But if, the slave perchance being in a province, the stipulation be taken (and suppose that the slave die before the thief or promisor can make him available), there is no ground for the reasoning we have set out above; for there cannot be deemed to have been an offer of him by reason of his absence. 4. I stipulated for Stichus or Pamphilus, when Pamphilus was already mine; not even if he ceased to be mine, would the promisor be released by giving Pamphilus; for there cannot be deemed either an obligation or discharge thereof in respect of Pamphilus. But when a man stipulates that a slave be given to him, the promisor will be released by giving even one who at the time of the promise belonged to the stipulator; he indeed has stipulated that there be given a slave who is not his own. Let us suppose the following stipulation: "Do you solemnly promise a slave from among those whom Sempronius leaves?" When Sempronius left three, one of them belonged to the stipulator; let us consider whether any obligation survives when the two who belonged to [Sempronius] die. Rather should the stipulation be held to fail unless the surviving slave no longer belonged to the stipulator before the other two died. 5. One who has to give a slave gives Stichus to whom his freedom is due under a *fideicommissum*; he is not held to be released; for he gives even less than one who delivers a slave not yet handed over in noxal surrender. Should not the same be said if he gives a corpse robber or other base slave? Certainly, we cannot deny that a slave has been given, and this case differs from the others; for [the stipulator] has a slave who cannot be taken from him. 6. One who promises a slave must give such a slave as the stipulator may, if he so wish, manumit.

73 MARCELLUS, *Digest, book 31:* In respect of a loan of thirty, I gave a surety for twenty and a pledge; now, from sale of the pledge, the creditor realized ten. Does that, as some think, come out of the whole, if the debtor, in paying ten, said nothing or is it, as I think, the case that the surety is released in respect of a full ten? For, by saying this, the debtor could bring it about that where he does not say it, that rather is to be held paid which is due in satisfaction. For my part, I think rather that the creditor may give a formal release for that which is due from the debtor alone.

74 MODESTINUS, *Rules, book 3:* What is exacted from a debtor by way of penalty should be the creditor's gain.

75 MODESTINUS, *Rules, book 8:* Just as formal release destroys rights of action till then existing, so also does merger; for if the debtor becomes heir of the creditor, the merger with the inheritance destroys the claimant's right of action.

76 MODESTINUS, *Replies, book 6:* Modestinus answered: If, without any pact, after the performance of all which is due in respect of a tutelage, there be a cesser of actions after the lapse of a period, that cesser will achieve nothing since no right of action

survives. But if this be done before performance or, when it is agreed that actions be transferred, then performance is made and the mandate follows, the mandated rights of action are preserved; for in this latter case, it would appear that the price of the mandated actions has been settled rather than that the pre-existing right of action has been destroyed.

77 MODESTINUS, *Encyclopaedia, book 7:* In the case of a freedman, there cannot be an earlier contract for days of service without which liberty would not be granted him.

78 JAVOLENUS, *From Cassius, book 11:* Should another's coins be paid, without the knowledge or volition of their owner, they remain the property of him to whom they belonged; should they have been mixed, it is written in the books of Gaius [Cassius Longinus] that should the blending be such that they cannot be identified, they become the property of the recipient so that their [former] owner acquires an action for theft against the man who gave them.

79 JAVOLENUS, *Letters, book 10:* Should I direct you to put money or anything else which you owe me where I can see it, the result is that you are released at once and that it becomes mine. For in such a case, no one else having physical control of the thing [or money], it is acquired by me, and in a sense, there is deemed to be a delivery by the long hand.

80 POMPONIUS, *Quintus Mucius, book 4:* In whichever way a contract be made, so it should also be resolved, so that if we contract by the delivery of a thing, it should be performed by the delivery of the thing. Thus, if we make a loan, the same amount of money should be repaid; and when we make a verbal contract, it can be discharged by delivery or by words—by words, if the promissor be given a formal release, by delivery, if the debtor give what he promised. Equally, if there be a sale and purchase or a letting [and hiring], since they can be entered into by bare agreement, they can also be dissolved by agreement to the contrary effect.

81 POMPONIUS, *Quintus Mucius, book 6:* Suppose that I stipulate that something be given to me or to Titius, payment cannot be made to his heir, if Titius dies. 1. Titius deposits a salver with me and then dies, leaving several heirs, and some of the heirs claim from me, it will be best that the praetor, when approached, bids me deliver the salver to those heirs, in which case, I will not be liable on the deposit to the remaining heirs. Even if I do so, without the praetor and without bad faith on my part, I will be released, or [preferably] I will incur no obligation. But it is best that this be done through the agency of the magistrate.

82 PROCULUS, *Letters, book 5:* When Cornelius gave his estate in Seia's name to her husband by way of dowry and took no undertaking about its return, he effected an agreement between Seia and the husband themselves that in the event of their divorce, the estate would be returned to Cornelius; I do not think that, the divorce taking place and with Seia's counterinstruction, the ex-husband could safely restore the estate to Cornelius, any more than if, when there had been no such pact, the woman directed the return of the land to Cornelius and then, before it had been made over, she forbade the transfer; the land could not safely be returned. But if, before Seia imposed her ban, the man restored the land to Cornelius who had no reason to think that he was acting against Seia's wishes, in my view it would be neither preferable nor equitable that the land should revert to Seia.

83 POMPONIUS, *Miscellaneous Readings, book 14:* Suppose that I make a loan to your slave and then I acquire him and, on his manumission, he repays me, he cannot recover [the money].

84 PROCULUS, *Letters, book 7:* You dealt with his master in the name of the slave over the *peculium*; [the jurist] replied that his sureties [the slave's] would not be released. But if the same slave paid coins from his *peculium*, having free administration thereof, you correctly read that his sureties would be released.

85 CALLISTRATUS, *Monitory Edict, book 1:* Full performance is made only both in quantity and on time.

86 PAUL, *Edict, book 8:* The rule which we observe is that performance cannot validly be made to a representative in litigation; for it is indeed absurd that it should be possible, before judgment, to make performance to one who does not have an action to enforce the judgment. If, though, he was so appointed that he might also receive performance, then release is obtained by performance to him.

87 CELSUS, *Digest, book 20:* I cannot recover any debt paid by my procurator because, when a man appoints a procurator of all his affairs, he is regarded as also authorizing that the latter pay money to his creditors, and ratification thereafter is not to be looked for.

88 SCAEVOLA, *Digest, book 5:* A mother conducted the affairs of her daughter, the intestate heiress of her father, and sent goods for auction, and this very fact was inscribed in the ledger; the auctioneers [bankers] paid the whole sum realized by the sale to the mother, and after this payment, for nigh on nine years whatever needed to be done, the mother did in the girl's name; she also married her off and delivered goods to her husband. The question was raised whether the girl has any action against the auctioneers since it was not she but her mother who stipulated for the price of what was put up for sale. The reply was that if the question was whether the auctioneers obtained their release at law by the payment, the answer is in the affirmative. CLAUDIUS: For there is the underlying question pending from the jurisdiction whether they are to be held to have paid in good faith the price of goods, which they knew to be the girl's, to the mother who had no right of administration; and so, if they knew this, they will not be released, should the mother be insolvent.

89 SCAEVOLA, *Digest, book 29:* On divers grounds and by bonds, a creditor provided as follows: "I, Titius Maevius, declare that I have received from, and have made a formal release to Gaius Titius for the whole balance of the money which, accounts being settled, Stichus, the slave of Gaius Titius, had undertaken to me." The question was this: There being other bonds entered into not by Stichus but by the debtor himself, does the right of action remain intact on these other bonds entered into by the actual debtor? His reply was that the only obligation discharged was that of which performance was set forth. 1. In respect of two bonds, under which four hundred were due to him from Seius, the one bond being for a hundred, the other for three hundred, Lucius Titius wrote to Seius that the hundred on the one bond be sent to himself through the agency of Maevius and Septicius; I ask this: If Seius states that he has also paid Maevius and Septicius on the bond for three hundred, will he be released? He replies that if [Lucius Titius] gave no mandate for payment of the three hundred and did not ratify the payment, there would be no release. 2. On the same day, Lucius Titius bound Seius by two stipulations, one for fifteen at a higher rate of interest, the other for twenty at a lower rate, the terms being that the twenty be paid first, that is, on the Ides of September; after the due date of both stipulations, the debtor paid twenty-six and nothing was said by the other about which stipulation the payment represented. I ask: Did the payment discharge the stipulation first due, that is, that for twenty, and the six represent interest thereon? He replied that on the whole, practice suggested this to be the case.

90 SCAEVOLA, *Digest, book 26:* A son, administering his father's estate as heir, advanced money therefrom to Sempronius and then, having specifically received it back, abstained from the estate, being a *minor.* The question was whether a curator appointed for the father's estate would have a valid action against Sempronius. The answer was that no reason had been advanced why he who had repaid the loan which he received should not be released.

91 LABEO, *Plausible Views, Epitomized by Paul, book 6:* Should your debtor, being present, not wish to be released from you, he cannot be so released against his will. PAUL: Nay, you can release your debtor who is present even against his will, supposing that you stipulate for the debt by way of novation; for even if you do not give a formal release, the matter will at once be ended, so far as concerns you since, in the event of your suing, a prescription of bad faith will bar your claim.

92 POMPONIUS, *Letters, book 9:* Suppose that you promise that someone else's slave will be given to me or that you are directed in a will to give him to me and that this slave, without its being your fault that you do not give him, is manumitted by his master, this manumission is similar to death; had he died, you would be released. 1. Again, if someone, being instituted heir by the master, gives as a *statuliber* the slave whom he promised to give, he will be released.

93 SCAEVOLA, *Questions Publicly Discussed, sole book:* Suppose that two people take a stipulation and one makes the other his heir; we must consider whether the obligation is merged. It is generally accepted that there is no merger. How is it right to say this? Because, if he should claim that the thing ought to be given to him, either it should be given to him because he is heir or because it is due to him in his own name. But there is a great distinction; for if either stipulator could be met with a temporary defense of pact [not to sue], it will be of interest whether the one appointed heir sues in his own name or as heir so that you can consider whether or not there is room for the defense. 1. Again, if there be two who promise and one institutes the other his heir, there will be no merger of the obligation. 2. But should the debtor make his surety his heir, there will be merger of the obligation. And virtually generally it is to be held that where the principal obligation accedes to that which is ancillary, there is a merger of obligation; when there are two principal obligations, one right of action is added to the other rather than there appears to be a merger. 3. What, then, if a surety should institute the principal debtor as his heir? On the view of Sabinus, there is a merger, despite the dissent of Proculus.

94 PAPINIAN, *Questions, book 8:* Should a person to whom his debtor has paid another's money persist, the coins remaining intact, in his claim for what is due to him without tendering what he has received, he will be defeated by the defense of bad faith. 1. If I lend or pay money which I own in common, there at once arises an action or release for my part whether one regard the common ownership as being undivided in the individual coins or, without regard to the specie, as in the quantity. 2. Suppose that a surety gives another's coins in respect of his suretyship, when they are spent, he has an action on mandate; hence, if he pays money which he stole, he will again have the action on mandate once he has made good for the theft or in a *condictio.* 3. Fabius Januarius to Papinian, greetings. When Titius owed Gaius Seius a certain sum under a *fideicommissum* and the same amount on a ground on which there could be no action and which did not present a claim on the payment, the slave agent of Titius, in his master's absence, paid a sum equivalent to one of the debts, and it was noted that it was paid out of the total due; I ask: On which ground is the payment to be seen as made? I replied: If, indeed, Seius so provided with Titius that the payment to him should be as from the total due, the term "credit" should be seen as referring only to the money due on the *fideicommissum* not to that for which no action lay, but, the money having been paid, it could not be reclaimed. But when Titius's slave agent, in his master's absence, paid the money, ownership of the coins would not be transferred in respect of that head of obligation for which the relief of a defense was available, although the payment be said to be under that head. For it is hardly likely that his master appointed the slave to pay money which did not have to be paid, any more than he should pay money from his *peculium* on a suretyship which the slave had not accepted for the good of the *peculium.*

95 PAPINIAN, *Questions, book 28:* "Do you solemnly promise to give Stichus or Pamphilus, whichever I choose?" The one having died, only the living one can be claimed, unless there had been delay in delivering the dead slave whom the claimant had chosen; for then only the deceased slave is due, just as if he alone had initially been the object of the obligation. 1. Now, suppose that the promisor had the choice, on the death of one, the survivor can equally be claimed. But if the death were the fault of the debtor who had the choice of giving, although no other can be claimed than the one who can still be given, there can be no offer of the estimated value of the dead slave,

which might be for less; this is established for the claimant as a penalty on the debtor. However, should the second slave die without fault on the debtor's part, in no way can an action be brought on the stipulation since, at the time of the death, the stipulation had not become operative. But since what has happened should not be left unpenalized, the action for bad faith can be sought with justice. The case is different with a surety who kills the promised slave, because the surety is liable on the stipulation, just as he would be if the debtor died heirless. 2. Acceptance of an inheritance sometimes merges the obligation; for instance, the creditor accepts the debtor's inheritance or the debtor the creditor's. At other times, it counts as performance, as when a creditor lends money to a *pupillus* without his tutor's authority and then becomes his heir; for he will obtain not the amount of the enrichment of the *pupillus* but retains the full amount of his advance out of the inheritance. Then it sometimes happens that an obligation devoid of content is confirmed by the acceptance of an inheritance. For if an heir, who hands over the inheritance under the [*senatus consultum*] *Trebellianum*, becomes heir to the fideicommissary or a woman, who undertakes an obligation for Titius, becomes the latter's heir, the civil obligation no longer is open to a defense by reason of the inheritance being that of one legally liable; there is no occasion for succor of the sex of a woman who ventures in her own name. 3. The common proposition that the surety who becomes heir to the debtor is released in respect of his suretyship is true whenever the obligation of the promisor is found to be fuller. For if the debtor were liable only to a certain extent, the surety will be released. On the other hand, it cannot be said that the obligation of the surety is not removed, should the debtor have had a personal defense particular to himself. For if he lent money in good faith to one under twenty-five, who lost the coins he received and died within the time for *restitutio in integrum* with the surety as his heir, it is difficult to say that the praetorian law, which could give relief to the *minor*, keeps firm the obligation of the surety, not the principal obligation to which the surety's was ancillary, without consideration by the praetor's law. Accordingly, the relief of *restitutio in integrum* will be preserved, during the relevant period, for the surety who becomes heir to the young man. 4. A natural obligation is automatically removed not only by payment of the money but also by a lawful pact or by an oath; the equitable bond which alone sustains it is dissolved by the equity of the pact. Hence, a surety, given by a *pupillus* [for a natural obligation], is said to be released on such grounds. 5. The question was put: Can a person stipulate "that ten be given to me or to my son" or "to me or my father?" However, the distinction can be usefully taken that where the son stipulates, the person of the father is added, since the stipulatory right cannot be acquired by him [the son]; contrariwise, when the father stipulates, nothing prevents the addition of the son, since what the father stipulates for his son, he is seen to stipulate for himself; for [the son] does not stipulate for himself. In this connection, it is patent that the person of the son is introduced not by way of obligation but as an agent of discharge. 6. I stipulate for the grant of a usufruct to me or to Titius; if Titius undergoes a change of status, this does not destroy the possibility of performance to Titius; for we can also stipulate "that it be granted to me or to Titius when he undergoes a change of status." 7. If the person of a lunatic or of a *pupillus* be added, the money will validly be given to the tutor or the curator also if it be properly given to the tutor or curator to implement some condition. This Labeo and Pegasus thought should be accepted on grounds of convenience, and it may be accepted if the money be applied to the interests of the *pupillus* or lunatic in the same way as when one bidden by the master to give to a slave so gives with the object of giving to the master. But a person directed to give to a slave will not be regarded as fulfilling the condition by giving to the master unless he does so by the wish of the slave. The same reply is to be made on the matter of performance if, when Sempronius stipulates that money be given to him or to Stichus, slave of Maevius, the debtor gives the money to the master, Maevius. 8. Should the creditor possess the inheritance of his debtor, which does not belong to him, and as much comes to him as

would release the heir if some other possessor of the estate had paid him, it cannot be said that sureties are released; nor is he to be regarded as having paid himself from whom the inheritance can be taken away. 9. By fraud, you ceased to possess what you seized from an inheritance belonging to someone else; should the [current] possessor give up the thing or its assessed value, that will benefit you for the claimant has no further interest; but if you are sued first for your fraud and you make amends, that will not avail the possessor. 10. Suppose that on my mandate, you advanced money to Titius; such a contract is similar to that of a tutor and the debtor of his *pupillus*; hence, when the mandator has been sued and condemned, reason does not suggest that the debtor is released, even though the money has been paid; but the creditor must also make available to the mandator the actions which he has against the debtor so that [the mandator] may obtain satisfaction. This is relevant to our comparison of the tutor and the debtor of a *pupillus*; for since the tutor is liable to the *pupillus* on the ground that he did not sue the debtor, neither tutor nor debtor is released by accepting litigation with the other nor, should the tutor pay, having lost the case, does the debtor profit thereby; but the tutor should proceed by the counter action on tutelage that the *pupillus* should cede to him his actions against debtors. 11. If, through his own fault, a creditor fails against his debtor, it follows that he should obtain nothing from the mandator by the action on mandate; for it is by his own fault that he cannot cede actions to the mandator. 12. Should the purchaser and vendor agree, before either has performed anything, that they should resile from the contract, a surety accepted in respect of the sale will be released by the dissolution of the contract.

96 PAPINIAN, *Replies, book 11:* Suppose that on the tutor's mandate, the debtor of a *pupillus* pays the money to a creditor of the tutor; release will follow if it be established that this was done without bad faith on the tutor's part. Otherwise, the tutor's creditor will be liable by the interdict on fraud to the *pupillus*, if he proves him to have shared the tutor's fraud. 1. When a *pupilla* became heiress to a magistrate who, in bad faith, had appointed a tutor for a *pupillus*, her tutors made a settlement with the youth; the girl had no wish to ratify the settlement. Nonetheless, she will be released by the tutor's money, and the tutors will have no effective action against the youth who has merely received what is his. Obviously, if the youth should choose to return the money to the tutor of the *pupilla*, the transaction being rescinded, he will have an effective action against the *pupilla* as heiress of the magistrate. 2. A sister to whom a legacy was due from her brother, the heir, having raised the issue of the legacy, made a settlement that, satisfied with a debtor's debt, she would not claim the legacy. It was held that although there was no delegation and no release followed, the risk in the debt was nonetheless hers, so that, should she claim the legacy contrary to the agreement, the defense of a pact [not to sue], could be effectively set up against her. 3. When pledges are given at the same time in respect of two contracts, the creditor must accept their value pro rata for the sum due on each contract, and he will have no choice, should the debtor attribute the value of the pledge to the total sum due. But if it were agreed at seperate times that the excess of the pledges be under charge, the earlier debt will be lawfully discharged by the value of the pledges, and the second set off by the excess. 4. While the instituted heir was deliberating [whether to accept the inheritance], money was paid in error to his substitute heir. When the inheritance subsequently devolves upon the latter, the ground for a *condictio* disappears, which means that the obligation of the debt is discharged.

97 PAPINIAN, *Definitions, book 2:* Where a debtor under several heads pays money in the absence of any specification, it will be attributed first to the debt due under threat of infamy; then, to that due under penalty; third, to that contracted under pledge or mortgage; after this order of priority, preference is given to one's own debt rather than that contracted for another, for example, as surety. The early jurists so laid down the order because it appeared the probability that a prudent and alert debtor would so have conducted his business. Should none of the above obtain, the earlier contract should be discharged first. If more money be paid than is required by the account of the individual items, still, the first contract, which has priority, having been discharged, the balance is deemed to have been given in whole or in part to reducing the second in order.

98 PAUL, *Questions, book 15:* One who charged his goods subsequently charged one of these possessions by promising a dowry for his daughter and paid it. Should that thing be evicted

by the creditor, it must be said that the husband can take action on the promise of dowry, as if the father had given for his daughter a *statuliber* or a thing bequeathed under a condition; the delivery of such things cannot effect a release, unless justified by the event, that is, the case in which it becomes certain that the things will remain [his]. 1. A different answer is given in respect of that money or thing which a patron, after the death of his freedman, takes by the [*actio*] *Fabriana*; for this action, being new, cannot revoke an effected release. 2. Likewise, the *minor* under twenty-five who, having been overreached by his creditor, gets *restitutio in integrum* of a thing given in respect of the debt. 3. We must accept that a head of household giving a thing out of [his son's] *peculium castrense* is as one giving another's property, although the thing may remain with the person to whom it is given, before the intestate death of the son; it will become the creditor's property on the death of the son; and so whose it is will be determined by the event, and the case will be that what happens later will resolve what was done in the past. 4. I can validly stipulate that ten be given to me without qualification or to Titius on the Kalends or under a condition; or that it be given to me on the first of January or to Titius on the first of February; one can, though, question a stipulation to me on the first of February but to Titius on the first of January; still it may more correctly be held that the stipulation is valid. For since the obligation is for a given date, the money can be given to one before the first of February, as it can also to [Titius]. 5. A person who stipulates for a giving to him or to Titius will be held to make a conditional stipulation if he says: "If you shall not have given to Titius, you shall give to me." And so also with a stipulation "to give ten to me or five to Titius"; the debtor will be released from his obligation by giving five to Titius. This can be accepted if it was the express intention that the stipulator was exacting a penalty for himself if no payment was made to Titius. But when there is a simple stipulation "to oneself or to Titius," Titius is added only for the purpose of payment, and so, when five have been given to him, there still remains an obligation for the other five. On the other hand, if I stipulate for five to me or ten to Titius, the framing of the stipulation does not admit that the debtor will be released from me by giving five to Titius; moreover, if he should give ten, he cannot recover five; but ten will be due to me [from Titius] by the action on mandate. 6. I stipulate for a giving to me at Rome or to Titius at Ephesus; let us consider whether the debtor obtains his release from me by giving to Titius at Ephesus; for, as Julian thinks, if different things are done, the case is different; but since the ground for giving prevails, he will be released. He will also be released, if I had stipulated that he give me Stichus or Pamphilus to Titius and he gave Pamphilus to Titius. But when I stipulate simply for something to be done, say, that a tenement be built on my site or on that of Titius, why should release not ensue if [the promisor] should build on Titius's site? For no one has said that release follows when act is peformed for act. However, the truer view is that release will follow; for we see not one act performed in place of another but the implementation of the promisor's election. 7. Should a usufructuary slave stipulate from the fructuary's resources for his real owner or for the fructuary, the stipulation is invalid; but if he should stipulate from his owner's resources for the owner or for the fructuary, the stipulation is good; for in this case, the fructuary has capacity only as a means of performance, not as a party to the obligation. 8. I promised a site belonging to someone else; the owner built a tenement on it; the question was asked whether the stipulation was destroyed. I replied that if I promised another's slave and he was manumitted by his owner, I would be released; and one cannot accept the view of Celsus that should he again become a slave under some statute, he could be claimed; for an obligation obliterated forever cannot be restored, and should he again become a slave, he is to be seen as being a different person. Nor can use be made of the comparable argument that if its owner unmade the ship which you had promised and then rebuilt it with the same timbers, you are liable; for here we have the same ship which you solemnly promised to give so that the obligation seems rather to cease than to be extinguished. There would be a parallel with the manumitted slave, if you were to propound that the ship was taken apart with the object of putting the timber to other uses and then, following a change of mind, it was rebuilt; for then the new ship will be deemed a different one just as the slave is a different slave. The site on which a building is erected is not like these cases; for it never ceases to exist. The site thus remains due, and its value will have to be given; for the site is part of the tenement, indeed its principal part, to which the

edifice accedes. We say differently if a promised slave be captured by the enemy; meanwhile he cannot be claimed; it is as if he were promised for a given date, but should he return with *postliminium*, he can then validly be claimed; here the obligation lapses. The site, however, exists as do the other components of the building. Finally, the *Law of the Twelve Tables* recognizes that building materials can be the object of a *vindicatio* but forbids the demolition of the structure and holds that their value be paid.

99 PAUL, *Replies, book 4:* He replied that a creditor cannot be required to accept money in any other form lest he suffer some disadvantage thereby.

100 PAUL, *Replies, book 10:* My question is this: Can money be paid at Rome to tutors or curators appointed in a province, which was so advanced at interest by them in the province that it should be paid at Rome, bearing in mind that these tutors or curators do not have the administration of affairs in Italy? Will the debtor be released by his payment? Paul's reply was that the debt to the *pupillus* is validly paid to those tutors or curators who lawfully administer his affairs; but those who are tutors or curators in provincial matters do not normally administer affairs in Italy, unless the provincial tutors specifically provide for a promise that render be made to them at Rome.

101 PAUL, *Replies, book 15:* Paul replied that those liable for an equal amount by reason of suretyship are not released when someone erroneously obtains more than the due amount from their colleagues. 1. Paul's answer was that there is a difference between the debtor paying and the creditor selling a pledge. For when a debtor pays money, he has the power to indicate under which head he pays it; but when the creditor sells a pledge, it is open to him to treat the price as attributed to an amount which was only naturally due and so, that deducted, he can sue for the debt [due at law].

102 SCAEVOLA, *Replies, book 5:* A creditor deferred money offered to him by his debtor as though to accept it at another time; thereafter, the money used by that *res publica* was taken on the order of the provincial governor as owing to the state; likewise, the money of a *pupillus*, earmarked for appropriate debts, was similarly confiscated; the question was: Who bears the loss? I replied that on the facts stated, the loss is not that of the creditor nor that of the tutor. 1. While there was agreement on the capital sum due, there was litigation over the matter of interest and, eventually, on appeal, it was ruled that interest already paid was irrecoverable but that for the future, no interest would be due; my query is whether the money already paid should go to interest or rather go to reduce the capital due. I replied that if the giver said that he was giving in respect of capital, the money should not be attributed to interest. 2. Valerius, slave of Lucius Titius, wrote: "I have received so many gold pieces out of a greater sum [due] from Marius Marinus"; my question is whether the sum should be treated as for the following year when there is a balance [due] for the previous year; my answer was that release pertained to the sum first due. 3. Titius took a loan and promised 5 percent interest and paid the same for a few years; thereafter, without any intervening pact and in error and ignorance, he paid six percent; I ask: Once the error is revealed, does the amount overpaid in respect of interest, as against what was stipulated for, go to reduce the capital? The answer was that if in error more was given as interest than was due, account should be taken in relation to the capital sum of the excess interest.

103 MARCIAN, *Fideicommissa, book 2:* Julian elegantly opines that when a debtor on several counts pays money, he should be treated as making payment on that count on which, at the time of the payment, he could be forced to pay.

104 MARCIAN, *Fideicommissa, book 8:* Payments and releases made by the heir before handing over the inheritance [to the fideicommissary] will be taken as valid.

105 PAUL, *Lex Falcidia, sole book:* Our observation concerning the heir who should pay forthwith to the testator's surety what he pays even before entering upon the inheritance, should be taken with some allowance of time; he does not have to accept [the inheritance] with an [already full] purse.

106 GAIUS, *Verbal Obligations, book 2:* It is one thing that by right of stipulation, performance may be made to Titius and another that this could happen, subsequently, with my permission. For if there be one to whom, by virtue of the stipulation, payment may be made, it may be made despite my veto; but should I authorize such performance in a different manner, no valid performance will be made to [Titius] in the event that before performance, I state to the promisor that such performance is not to be made.

107 POMPONIUS, *Introduction, book 2:* A verbal obligation is resolved either naturally or at civil law; naturally, when, for example, performance is made or the thing, the object of the stipulation, ceases to exist without fault on the part of the promisor; at civil law, by a formal release or when the roles of promisor and stipulator vest in the same person.

108 PAUL, *Handbook, book 2:* Performance is rightly made to one who stipulated for after my death at my behest; such are the terms of the obligation. So also, even against my will, performance is lawfully made to him. But no valid performance is made to one to whom I directed my debtor to pay after my death, because the mandate is discharged by death.

4

FORMAL RELEASES

1 MODESTINUS, *Rules, book 2:* Formal release is release by mutual questioning whereby each obtains absolution from the same [legal] bond.

2 ULPIAN, *Sabinus, book 24:* A *pupillus* can be discharged by formal release even without his tutor's authority.

3 PAUL, *Sabinus, book 4:* He cannot be released via a procurator; nor can anyone release him by formal release without a mandate.

4 POMPONIUS, *Sabinus, book 9:* There can be no conditional formal release.

5 ULPIAN, *Sabinus, book 34:* A formal release made as from a certain date is of no consequence; for such release should effect discharge as does performance.

6 ULPIAN, *Sabinus, book 47:* Where several stipulations have been taken, should the debtor seek release thus: "Have you received what I promised you?" Then, assuming that it be clear what is intended, only that obligation is discharged by the formal release; should that not be clear, there is release from all the stipulations. We must, though, remember that if I release one obligation when you have asked in respect of another, the formal release has no effect.

7 ULPIAN, *Sabinus, book 50:* A formal release can undoubtedly also be made in the following fashion: "Do you make acceptance of ten?" With the reply, "I do."

8 ULPIAN, *Sabinus, book 48:* It may be questioned whether an ineffective formal release may contain an effective pact. Unless there be a contrary intention in the matter, there is an inherent pact. Should someone say: "How could there not be consent?" "Why should it not?" Let us suppose that one making a formal release knows and is fully aware that he has made a release of no effect; who would doubt that there is no pact? For there would have been no intent to make such agreement. 1. A slave owned in common, just as he can stipulate for both his masters, so can he, on seeking release for one of his masters, obtain release in full for one of them; so thinks Octavenus

also. 2. A slave owned in common can also, by formal release, discharge one of his masters even from the other master. That was the view of Labeo, who further wrote in a book of his *Plausible Views* that if the slave stipulated from his first master, Primus, from the latter's co-owner, Secundus, he could, by seeking formal release from Secundus, discharge thereby also Primus whom he had put under obligation; so it can come about that through one and the same slave, an obligation may be both created and extinguished. 3. There can be no formal release except verbally; for the release discharges a verbal obligation, being itself made orally; nor can an obligation be discharged orally which was not made verbally. 4. By making a [stipulatory] promise, a son-in-power puts not his head of household but himself under an obligation at civil law; accordingly, by seeking formal release, the son can get his own release, since he is the person bound. The head of household, on the other hand, by such formal release effects nothing, since it is not he but his son who is under obligation. The same is to be said of a slave. For the slave can accept formal release and thereby discharge even praetorian obligations existing against his master. Our observance is that formal release is a matter of the law of nations. I think, therefore, that [the slave] can obtain such release even in Greek, provided that [the Greek] matches the Latin words: "Have you received so many denarii? I have."

9 PAUL, *Sabinus, book 12:* There can be release of part of a stipulation, not only in these words, "have you received five of the ten which I promised you," but also as follows, "have you received, as to half, what I promised you?"

10 POMPONIUS, *Sabinus, book 26:* Supposing even that not a sum of cash but a specific thing, say a slave, be the object of a stipulation, there can be a partial formal release; in this way, the release of one of [several] heirs may be effected.

11 PAUL, *Sabinus, book 12:* A type of acquisition is to release a master from an obligation; hence, even a fructuary slave can release his fructuary by a formal release, since the very fact [thereof] is deemed an acquisition [to him]. But even if we have the mere use [of the slave], the same applies. The same is to be said of those in servitude to us in good faith and of others subject to our power. 1. Even if I grant a formal release to a slave from what he may have promised me, I will have no effective praetorian actions against his master, whether those in respect of his *peculium* or those on what has been turned to his profit. 2. Now if a slave of the inheritance, before the inheritance is accepted, should receive a formal release of what the deceased undertook to do, the better view, I think, is that release follows so that, thereby, the inheritance is released. 3. Moreover, it must be said that if [the slave's] master be in the hands of the enemy, the formal release will be confirmed [on his return] by the right of *postliminium*; for a slave can also stipulate for one in enemy hands.

12 POMPONIUS, *Sabinus, book 26:* That which is due under a condition or as from a certain time can be validly discharged by a formal release; but only if it be clear that this depends on the realization of the condition or the arrival of the given date.

13 ULPIAN, *Sabinus, book 50:* The more correct view is that the obligation for services, imposed by oath on a freedman, may be discharged by a formal release. 1. If the object of the stipulation be incapable of division, a partial release is of no consequence, for instance, in the case of a rustic or urban praedial servitude. Of course, should a usufruct, say of the Titian estate, be the object of the stipulation, a partial release is possible and there will be a usufruct of the rest of the estate. Should, however, one who stipulated for a general right of passage grant formal release in respect of a personal right of way or of passage with cattle, the release has no effect. The same view is to be endorsed if passage with cattle be released. But if both passage with cattle and the simple right of way be formally discharged, it follows that we say that the general right of passage is removed as a burden on the person who promised it. 2. It is certain that he who, having stipulated for an estate, gives a formal release in respect of usufruct or right of passage is in such case that the release is not valid; for one who makes a release must do so in respect of the whole or part of what he stipulates for. These [rights], however, are not parts any more than if a man, having stipulated for a house, gave a release in respect of the materials therein or windows or a wall or the

living room. 3. Should someone, having stipulated for a usufruct, give a release of the use, if he do so as though [only] use was due, release does not follow; but if as out of the usufruct, it must be said that the formal release is good, since use can exist without fruits. 4. Julian, in the fifty-fourth book of his *Digest*, writes that a man stipulating for a slave who gives a formal release of Stichus makes an effective such release and removes the whole obligation; of what the promisor can perform even against the stipulator's wishes, formal release brings discharge. 5. It is settled that one stipulating for land cannot give a release in respect of the clause on bad faith; for it is not part of what is due and one thing thus is due and another is released. 6. Suppose that I stipulate, under a condition, for Stichus or for ten and give a release in relation to Stichus and, while the condition is pending, Stichus dies, the ten remain due, just as though no release had been given. 7. Should a surety be given a release when the principal debtor is bound by a real, not a verbal, obligation, is the principal also discharged? Our observance is that even though the principal be not under a verbal obligation, the release discharges him through the medium of the surety. 8. If release be granted to a surety taken in respect of legacies bequeathed under a condition, the legacies will be due when their condition is satisfied. 9. A man stipulated from a surety, "do you promise on your honor what I shall lend to Titius," and then released the surety before having made any advance, the principal debtor will not also be discharged but will be liable whenever an advance be made to him; even if we believe the surety not to obtain his release until an advance has been made, the principal debtor could not be discharged by a release granted before his obligation arose. 10. A tutor, curator of a lunatic, and procurator cannot grant a release. All will have first to novate [the existing obligation]. They can thus effect a release. It is not open to them to grant a release, but after novation they can be discharged by release. For even in respect of absent persons, we employ this device: We stipulate from someone with a view to novation what the absent person owes us and so effect a discharge for the person from whom we stipulate; so it comes about the absentee is discharged by the novation and the person present by formal release. 11. An heir and praetorian successors too can release and be released. 12. Should one of several stipulators grant a release, complete discharge ensues.

14 PAUL, *Sabinus, book 12:* Unless the release matches the obligation and unless what is specified in the release be correct, the release will be imperfect; for verbal obligations can be resolved only by matching words.

15 POMPONIUS, *Sabinus, book 27:* Suppose that one who has promised Stichus puts the question: "Since I promised Stichus, have you received Stichus and Pamphilus?" I think that there is a valid release and that the mention of Pamphilus is superfluous. In the same way, if one who promised ten should ask, "Since I promised you ten, have you received twenty," he will be discharged in respect of ten.

16 ULPIAN, *Disputations, book 7:* Should one of several co-debtors receive his release, not only he but also those who bound themselves with him will be discharged. For when one of two or more parties to the same obligation receives his release, the others do likewise, not because they have received a release but because he is regarded as having made performance. 1. If a surety taken for a judgment be granted a release, the judgment debtor will also be discharged.

17 JULIAN, *Digest, book 54:* One who stipulated for a slave or for ten may, having granted a release of five, destroy part of the obligation and claim five or a share in the slave.

18 FLORENTINUS, *Institutes, book 8:* One formal release and discharge is possible of one of several contractual obligations, whether certain or nonspecific, or of some, reserving the others. A stipulation of the content, followed by release, was formulated by Aquilius Gallus as follows: "Whatever you have or may have to give to or do for

me, on whatever ground, whether presently due or at a given time, and whatever action, claim, or proceedings in respect of them I have or will have against you, what you have, hold and possess of mine, however much each of these be worth, Aulus Agerius stipulated and Numerius Negidius solemnly promised." "What Numerius Negidius promised and pledged to Aulus Agerius, Numerius Negidius asked Aulus Agerius whether he had received it. Aulus Agerius acknowledged receipt to Numerius Negidius."

19 ULPIAN, *Rules, book 2:* Should formal release be granted to one under a real, not a verbal, obligation, he will not indeed be discharged, but he will be able to protect himself with the defense of bad faith or that of an agreed pact. 1. Between release and receipt, there is this difference: by formal release, complete discharge results even though the money has not been paid; by receipt, only when the money has been paid.

20 ULPIAN, *Edict, book 77:* If a clause in respect of a decided issue be released, Marcellus says that the other parts of the stipulation disappear; for it was interposed only that the issue could be ruled upon.

21 VENULEIUS, *Stipulations, book 11:* Should I stipulate, by way of novation, for a legacy left to me under a condition and grant a formal release before the condition is realized, Nerva the Younger says that even if the condition be satisfied, there will be neither an action on the will, because of the novation, nor one on the stipulation which was dissolved by the release.

22 GAIUS, *Verbal Obligations, book 3:* A slave can grant formal release only on his master's order.

23 LABEO, *Plausible Views, Epitomized by Paul, book 5:* If I grant you a formal release, I am in no way freed from you. PAUL: Nay; when letting and hiring or sale and purchase are made by agreement and nothing has yet followed, both parties will be discharged by such a release, even if it were granted by only one of them.

5

PRAETORIAN STIPULATIONS

1 ULPIAN, *Edict, book 70:* There appear to be three types of praetorian stipulation: judicial, by way of security, and common. 1. We style judicial those which, in respect of litigation, are interposed that [the decision] be ratified, that it will be discharged and that form a declaration in connection with a new construction. 2. Those by way of security are those resembling an action and occur, like a novel action, for example, stipulations in respect of legacies, tutelage, that [a procurator's proceedings] will be ratified or on account of threatened damage. 3. Common are stipulations for appearance in legal proceedings. 4. It should, though, be appreciated that all stipulations of their nature are by way of security; for the purpose of the stipulations is that one may be more secure and protected through the interposition of the stipulation. 5. There are some of these praetorian stipulations which require security; others seek a mere counterpromise; but these latter are very few. They having been listed, it will be clear that the rest are not counterpromises but for security. 6. Hence, the stipulation in respect of a declaration concerning a new construction is now for security, now a counterpromise. Let us consider, in respect of such stipulation, how security is provided; in the case of a construction on private land, there is security; for that on a public site, a counterpromise is required. Further, those who give undertakings in

their own name, make a counterpromise; in the name of another, they give security. 7. Similarly, there is sometimes a counterpromise, sometimes security, in the matter of threatened damage; for if it be in a public river, security is the essence but in respect of [private] buildings, there is a counterpromise. 8. A counterpromise is a stipulation for double value unless the agreement be for security. 9. Should there, however, be any dispute, if it is said, for instance, that the stipulation is sought through abuse of legal proceedings, the praetor himself should briefly investigate the matter and direct or refuse the undertaking accordingly. 10. Then again, any appropriate addition to, detraction from, or alteration in the stipulation will be a matter for the praetor's jurisdiction.

2 PAUL, *Edict, book 73:* The content of praetorian stipulations is either the restitution of a thing or an unspecified amount. 1. [Of the former] there is the stipulation on declaration of a new construction whereby it is undertaken that the operation will be restored; hence, whether the plaintiff or the debtor die, leaving more than one heir, if one [of the heirs of the former] be successful or [one of the latter's heirs] be defeated, the whole work will have to be restored [to its former state]; for so long as anything remains, the work cannot be regarded as restored. 2. An unspecified amount is the content of a stipulation that a judgment will be honored and ratified by [the procurator's] principal, for threatened damage and others like them, in the case of which it is replied that they are divided up against the persons of the heirs; although it can be said that from the person of the heirs of the promisor, a stipulation descending from the deceased cannot put any in a different position. On the contrary, it is eminently reasonable that when one of the heirs of the stipulator is successful, the stipulation becomes operative so far as he is concerned; this is the effect of the words of the stipulation "for as much as the matter may be worth." But Julian writes that if one of the heirs of the promisor possess [the whole building], he is to be condemned in full; it can be a matter of debate how far he is liable on the stipulation as also the sureties and whether they are wholly liable. [Julian] says that one has to consider whether the stipulation be operative; but if, after joinder of issue, the possessor should die, one of his heirs should, although he possess the whole land, not be condemned for more than his hereditary portion.

3 ULPIAN, *Edict, book 79:* Generally, in all praetorian stipulations and those of procurators, security is given.

4 PAUL, *Edict, book 75:* Praetorian stipulations are often taken when, without the stipulator's fault, no undertaking has been given.

5 PAUL, *Edict, book 48:* In the case of all praetorian stipulations, it is to be observed that should my procurator stipulate, I have an action thereon, the issue having been examined. The same applies when a business manager finds himself in the position that he being the intermediary, his principal is likely to lose his property, for instance, when [the principal's] goods are sold; the praetor should come to the principal's aid.

6 PAUL, *Plautius, book 14:* In all praetorian stipulations in which we provide first that something be done and then that if it be not done, a penalty follows, the stipulation becomes operative in respect of the penalty.

7 ULPIAN, *Edict, book 14:* Praetorian stipulations require those giving security in their own behalf and neither by pledges nor by the deposit of gold, silver, or money can one satisfy this obligation of security.

8 PAPINIAN, *Questions, book 5:* PAUL notes: One instituted heir under a condition, having acquired possession of the estate, must give security to his substitute for an extended period; for the praetor has no desire that his benevolence should be the unfair advantage of anyone; and it cannot appear that someone, who has a predecessor, abuses legal process in seeking security. 1. A legacy is left to Titius and Maevius under conflicting conditions; security must be given to each, since each anticipates the legacy as the testator desired.

9 VENULEIUS, *Stipulations, book 1:* Should there be any ambiguous expression in a praetorian stipulation, its interpretation is a matter for the praetor; his is the intention to be taken into account.

10 ULPIAN, *Replies, book 1:* His reply to Valerian was: A provincial governor first ordered security for a three-years' period and later for a longer term; since he subsequently wished to depart from the initial stipulation, a defense must be seen as appearing for those bound by the initial stipulation.

11 VENULEIUS, *Actions, book 8:* In the kind of stipulation which comprises a promise for "whatever the matter be worth," it is more advantageous to envisage a specific sum, since it is often difficult to establish what is the value and a trifling sum may be the consequence.

6

THAT THE PROPERTY OF A *PUPILLUS* OR A YOUTH BE INTACT

1 PAUL, *Edict, book 24:* When security has been given that the property of a *pupillus* will be intact, action thereon becomes possible at the time that the action on tutelage becomes available.

2 ULPIAN, *Edict, book 79:* Should a *pupillus* be absent or unable to speak, his slave will stipulate for him; if he has no slave, one should be bought for him; should he have no means or the purchase be protracted, we say that a public slave should stipulate before the praetor

3 ULPIAN, *Edict, book 35:* (or the praetor should appoint someone to whom the undertaking may be made)

4 ULPIAN, *Edict, book 79:* not that he acquires at law thereby for the *pupillus* (nor does he acquire himself) but he effects it that the *pupillus* acquires an *actio utilis* on the stipulation. 1. The undertaking to the *pupillus* by this stipulation is one of security. 2. It should be known that by such stipulation there are bound the tutor himself, one who administers affairs as though he were tutor, and their sureties. 3. One who does not administer will in no way be liable; for the action on tutelage does not lie against a nonadministrator; but he is to be proceeded against by an *actio utilis*; for it is at his own peril that he failed to act; nevertheless, neither he nor his sureties are suable by the action on the stipulation. Hence, he will have to be compelled to assume administration so that he too can be liable on the stipulation. 4. It is accepted that this stipulation becomes operative at the end of the tutelage and sureties become liable from that date. The case of a curator is different as also that of a person who conducts affairs as though he were tutor. These stipulations, then, become operative at the end of his tutelage, if a man has been a genuine tutor; if, though, he had administered as though he were tutor, it is appropriate to say that the stipulation becomes operative as soon as any thing ceases to be intact. 5. Let us consider whether the stipulation becomes operative, in the event of the tutor's being captured by the enemy. The relevant factor is that the tutelage is ended even though it may be hoped that he will regain it; I think that proceedings are possible. 6. It should be understood generally that in those cases, in which we have said that the action on tutelage does not lie, it must be said that equally an action on the stipulation that property be intact does not lie. 7. Where an appointed curator does not exercise his office, it follows that one has to say that the stipulation does not become operative; but the same applies as what we have said of a tutor, except that the stipulation becomes enforceable as soon as something ceases to be intact and sureties become liable; but it returns on him. 8. Now this stipulation pertains to all curators, whether for those above or those below the age of puberty, who are appointed on the grounds of the infirmity of age [of those in their charge] and to those appointed for spendthrifts, lunatics, and some others [which can happen].

5 PAUL, *Edict, book 76:* A son in the power of a lunatic who stipulates that [the lunatic's] property shall be intact acquires an obligation for his father.

6 GAIUS, *Provincial Edict, book 27:* It is necessary for the slave of a *pupillus* to stipulate when the *pupillus* is absent or unable to speak; for should the *pupillus* be both present and able to speak, then, even though he be of such age that he does not understand what he is doing, it is accepted for convenience that he lawfully stipulates himself.

7 MODESTINUS, *Rules, book 6:* An appointed or testamentary tutor or a curator does not claim security from a fellow guardian, but he can offer him the choice of receiving or giving security.

8 ULPIAN, *Edict, book 2:* And if a curator be appointed for a specific thing [or things], the stipulation that it [they] be intact will be taken.

9 POMPONIUS, *Sabinus, book 15:* When a *pupillus* stipulates from his tutor that his property be intact, not only tangible assets but also credits are comprised in the stipulation; for anything that comes within the action on tutelage is covered by the stipulation.

10 AFRICANUS, *Questions, book 3:* Should the tutor, on the reaching of puberty by the *pupillus*, be guilty of some delay in restoring his charge, it is certain that both he and his sureties will be liable for interim fruits and interest.

11 NERATIUS, *Parchments, book 4:* When an undertaking is given to a *pupillus* that his property shall be intact, the stipulation becomes operative, if there is not produced what should be given or effected under the tutelage; for even if the property be intact, it really is not, because what should be given or effected has not been performed.

12 PAPINIAN, *Questions, book 12:* When a tutor gives several sureties to his *pupillus*, he is not to be engaged, but an action is to be granted against one of them in such wise that rights of action shall be made over to the one who is sued. No one will think that there has been departure from right after it has been seen fit to condemn tutors in respect of their shares of the administration; and indeed in full, if the matter is not preserved by the others and relevant fault is uncovered, which will extend to make him suspect. For the equity of the *arbiter* and the duty of a good man are regarded as requiring that form of right. But sureties, liable in full at civil law, can ask that the action be divided when others bring proceedings; but when the *pupillus* himself brings the action, who did not himself contract but fell in with the tutor, knowing of nothing, the benefit of dividing the action would appear harmful in that, arising from the one tutelage, several varied questions would have to be settled before different judges.

7

THAT A JUDGMENT BE PERFORMED

1 PAUL, *Edict, book 24:* In the case of a stipulation that a judgment will be performed, it becomes effective immediately, the decision has been given [in the action], but the demand for payment is deferred for the period granted to the principal debtor.

2 PAUL, *Edict, book 71:* The suit dying, there is no issue, and so it is settled that sureties are not liable on the stipulation that the judgment will be performed.

3 ULPIAN, *Edict, book 77:* Should a person about to go before some judge stipulate that the judgment be performed and his action in fact proceeds before a different judge, the stipulation is not enforceable, because the sureties did not submit themselves to the ruling of this judge. 1. A procurator, tutor, or curator can put the question in a stipulation that a judgment be performed. 2. We regard as a procurator one who has been given a mandate, whether he has accepted a mandate for this matter only or is in charge of all affairs; indeed, if what a man does be ratified, he is regarded as a procurator. 3. Now should some child or parent appear or a husband on his wife's behalf, persons from whom a mandate is not required, the question arises

whether the stipulation becomes enforceable; on the whole, it should not without a mandate or ratification; the fact that under the praetor's edict, such persons are permitted to conduct proceedings does not make them procurators. Accordingly, should such person appear, undertakings will have to be given all over again. 4. What we have said about the tutor is to be understood in the sense that if someone is administering a tutelage when he is not in fact tutor, he is not covered by the term "tutor." 5. If, indeed, he be tutor but does not administer affairs as being tutor (through ignorance or for some other reason), we must say that the stipulation does not become enforceable; for under the praetor's edict, the capacity for conducting litigation is granted to that tutor to whom the tutelage is allowed by a parent or a majority of the tutors who have the power to do so. 6. We accept the curators of lunatics, male or female, as also of wards of either sex and of others, for example, a *minor*; or if he be curator of anyone else, I think that the stipulation is enforceable. 7. Suppose a tutor to be appointed for a specific region or province or for affairs in Italy, the attendant ruling will be that the stipulation will become enforceable, if he brought proceedings on a ground pertaining to his field of administration. 8. Should the defendant, after promising that the judgment would be performed, lose his reason, the question is whether the stipulation becomes enforceable on the ground that the suit is not defended; the better view is that it does, if no one takes up his cause. 9. The stipulator does not become enforceable for nondefense, so long as there is someone who can defend it. 10. If there be several sureties, when issue has been joined with one of them under the head of nondefense, the principal debtor himself may undertake the defense.

4 JULIAN, *Digest, book 55:* But the person against whom proceedings had been taken must be absolved.

5 ULPIAN, *Edict, book 77:* But if the surety who accepted proceedings has been already condemned, the principal undertakes the defense in vain. Again, if payment has been made after the judgment, we will authorize recovery of what was paid. 1. One of several sureties or heirs can take the defense on the default of another. 2. Since several causes are comprised in one sum in this stipulation, should the stipulation once become enforceable under one head, it cannot be again in respect of another. 3. Now let us consider what kind of defense is required and of whom to prevent enforceability of the stipulation. Should anyone of a list of persons be successful, the stipulation does not become enforceable; for, obviously, he has made a valid defense. Again, where some stranger has intervened, again the stipulation does not become enforceable, provided that he defends the issue according to the judgment of a good man, that is, he gives security; when, however, he is merely prepared to defend but is not allowed to, the stipulation becomes enforceable for nondefense. But should he be allowed to defend, whether with or without security, it will have to be said that no part of the stipulation becomes enforceable, because one who admits such a defender must take the blame upon himself. 4. When there appears a defender from among several sureties who have undertaken that the judgment will be performed, it is settled that the stipulation does not become enforceable for lack of defense; for the rest, it is like the case of a stranger defender. 5. On this stipulation, discussion arises whether those who stood surety are liable to an action on mandate in the event of their failure to defend; the more correct view is that they are not for their mandate was not the defense as such but the amount [which might be avoided in damages]. 6. But what if they took it also upon themselves that they would defend; can they proceed on mandate? Now, should they be unsuccessful in their defense, they can indeed recover what they have paid up in respect of the judgment; but by no means do they claim the costs of the suit. Should they, however, pay them, they can recover the costs, as being adjacent to the mandate even though that was not the mandate they made. 7. In the event of several sureties being ready to defend, let us consider whether they should appoint one defender or whether it will meet the case that each defends, or appoints a defender, for his individual share. On the whole, unless they appoint a single procurator, this, of

course, being the plaintiff's wish, the stipulation will become enforceable for nondefense; equally, heirs of the principal defendant would have to appoint a single creditor, lest division of the defense between several should adversely affect the plaintiff. Their position would be different against heirs of the plaintiff against whom they are constrained by no necessity to litigate through a single person. 8. It must be known that for a valid defense, the issue must be defended in the place where proceedings ought to take place.

6 ULPIAN, *Edict, book 78:* The stipulation that a judgment will be performed comprises three provisions in one: the eventual award, the defense, and [the absence of] bad faith.

7 GAIUS, *Provincial Edict, book 27:* Suppose that before proceedings, a procurator be forbidden by his principal to act and that the plaintiff, not knowing of the ban, proceed with the action; does the stipulation come into force? No answer is possible other than that it does. Should the plaintiff so proceed, knowing of the ban, Julian's view is that the stipulation is not enforceable; for that to happen, he says, it is not enough that proceedings go on against the person comprised in the stipulation; that person's cause must also remain the same as that at the time that the stipulation was taken. Hence, should the appointed procurator become heir to his principal and so accept proceedings or even accept them when barred, the stipulation does not come into force; it is also elsewhere replied that if the defendant gave an absent person as guarantor and then either a procurator appointed by him or the absent person himself, become the defendant's heir, accepted proceedings, the sureties are not liable.

8 PAUL, *Edict, book 74:* Should the plaintiff, after security taken, become heir to the possessor before proceedings ensue, the stipulation is extinguished.

9 ULPIAN, *Edict, book 14:* The stipulation that a judgment will be performed has a definite content; for it is enforceable for the amount which the judge shall award.

10 MODESTINUS, *Encyclopaedia, book 4:* When a procurator is appointed to defend an action, it is directed that security be given by stipulation that the judgment will be performed, not from the procurator himself but from his principal in the suit. But if the procurator defends someone, he himself is obliged to give security by that stipulation.

11 PAUL, *Edict, book 74:* Should a slave, claimed in an action *in rem*, die after joinder of issue and the possessor thereafter abandon the suit, there are those who think that the sureties whom he gave for the suit are not liable because, the slave being dead, no object of the suit now exists. This is wrong because there is the issue of eviction of the action with the object of preservation and the issue of fruits.

12 POMPONIUS, *Edict, book 26:* Should the defendant, after his undertaking that the judgment will be performed, be elevated to the magistracy and so become incapable of summons to proceedings against his will, his sureties nonetheless will be liable if the issue is not defended on the standard of a good man.

13 ULPIAN, *Disputations, book 7:* Assuming that the stipulation that the judgment will be performed has been given, then, the question was asked: When a person does not defend the issue and subsequently suffers judgment by default, is the stipulation enforceable on the ground of judgment given? I used to say that the stipulation that judgment will be performed contained in one single clause both the issue of nondefense and that of judgment given. Hence, since that stipulation is all in one clause, whether the issue be decided or undefended, it is a good question whether, it having become enforceable under one head, it can again become enforceable under the other. Look! Suppose a stipulation, "if the ship comes from Asia or if Titius becomes consul," it is settled that whether it be the arrival of the ship or Titius's consulship which happens first, the stipulation becomes operative and, once so for the earlier event, does not do so again when the second happens, even though the second occurs; either event, not both, was the content of the stipulation. In similar fashion, it has to be considered whether the stipulation becomes operative on nondefense or, the issue being defended, whether it first becomes operative only when issue is joined on the stipulation. This is more the case. Accordingly, sureties are not to be regarded as liable as soon as

it becomes apparent that the issue is not being defended. Likewise, should the suit for which a defense was necessary be terminated by performance, settlement, formal release, or any other means, the accepted consequence is that the ground of nondefense disappears. 1. Should I stipulate for performance of the judgment from a surety of a procurator, as suing by action *in rem*, and then proceed *in personam*, or as bringing one action, and then ask a different action, the stipulation is not enforceable, because process was on one ground, the stipulation on another.

14 JULIAN, *Digest, book 55:* Two sureties promised that a judgment would be performed; one paid his share on the ground of nondefense; the issue could still be defended, but he who paid could not recover [his money]. For the stipulation has been destroyed, so far as he is concerned, just as if there had been a formal release. 1. Whenever proceedings are taken against sureties on a stipulation that judgment will be performed on the ground of nondefense, it is not unfair that undertakings be given that their principal is absolved by the earlier action; for without such an undertaking, the sureties will gain nothing by an action on mandate or, at any rate, to defend the principal in the earlier action.

15 AFRICANUS, *Questions, book 6:* The stipulation "so long as the issue is not defended" is resolved as soon as the issue begins to be defended or becomes unnecessary of defense.

16 NERATIUS, *Parchments, book 3:* I wish to proceed for nondefense against one of the sureties on a stipulation that the judgment would be performed; he is ready to pay me in respect of his share [of liability]; no action against him should be granted to me. For it is not fair that he should either be engaged in action or compelled to a denial when he is prepared, without a judge, to give that, no more than which his opponent would recover from him before a judge.

17 VENULEIUS, *Stipulations, book 6:* The stipulation becomes wholly enforceable under the head of judgment given, bad faith, or nondefense; an issue is not regarded as defended according to the lights of a good man, if it is not defended in full.

18 VENULEIUS, *Disputations, book 7:* A good man does not regard a case as undefended when the praetor does not compel the defendant to accept it.

19 VENULEIUS, *Stipulations, book 9:* The last head of the stipulation that a judgment will be performed, that is, "that bad faith is and will be absent" shows a fact lasting into the future. Accordingly, should the man guilty of bad faith die, his heir will be liable: for the expression "will be absent" is exhaustive and refers to all time so that if there were any time when bad faith was not absent, the clause is enforceable because it is true that bad faith was not absent. 1. But should there be added, "if there be no absence of bad faith on the part of this defendant, do you solemnly promise to give what the issue be worth," the promisor will be liable to a penalty for bad faith even by an outsider. 2. The clause on bad faith, like other stipulations in which no specific time is mentioned, relates to the beginning of the stipulation.

20 SCAEVOLA, *Digest, book 20:* When a defendant was defended before the appointed judge, Sempronius, it was undertaken by stipulation that there would be performed what Sempronius should adjudicate. The plaintiff appealed from Sempronius's judgment and, judgment going against the defender when the matter was tried before the competent appellate judge, the question was asked whether the stipulation had become operative. The reply was that, on the case put, it was not enforceable at law. CLAUDIUS: Hence, there is added by stipulation, "or whoever is substituted to his place."

21 SCAEVOLA, *Questions Publicly Discussed, sole book:* Should one of the sureties be

sued on the ground of nondefense and subsequently the issue be defended, another of the sureties can be sued on the count of the issue having been decided. And suppose that on the death of the promisor leaving two heirs, the one defends the issue, the other does not; the one who does not defend can be sued for nondefense, the one who does defend on the ground of the issue having been decided. For we do not believe that these two clauses are enforceable against one and the same person, and we say that the clause on the issue having been decided always prevails and that it alone becomes operative.

8

CONFIRMATION AND RATIFICATION

1 PAPINIAN, *Questions, book 28:* When someone stipulates concerning ratification, then, although it is not he personally who is sued by the principal but another who cannot be brought to court, still, if he ratifies it, it is settled that the stipulation is operative, just as when a surety is sued or one of two promisors who is a partner [of the other].

2 PAPINIAN, *Replies, book 11:* In the stipulation on ratification, the consideration is not the gain of the promisor or of the stipulator but what it will mean to the latter that what is done should be ratified.

3 PAPINIAN, *Replies, book 12:* When a *minor* under twenty-five, as creditor, wishes to recover money, an interposed procurator gives an undertaking of ratification to the debtor; *restitutio in integrum* having been granted, neither does the *condictio indebiti* lie nor does the stipulation become operative. The same holds if the *minor* ratifies the act of a false procurator. Hence, it should be undertaken, the mandate [to the procurator] having already been given, "if he or his heir be granted *restitutio in integrum* or he to whom there pertains the issue in question, such-and-such money will be given." Even where there has been no intervening mandate, these words are more prudently added between the parties to the agreement to the general words on ratification; otherwise, if he does not agree and the *minor* creditor does not consent, an action should be granted. 1. A false procurator gave an undertaking on ratification, and his principal, judgment having gone against the procurator, appealed against the judge's decision; the prerequisite of the stipulation appeared to be lacking, since the defeated party had but resorted to a common refuge. But should a principal who had not ratified have demanded the money, the ratification stipulation would be operative in respect of that money which the principal accepted although the procurator received nothing.

4 SCAEVOLA, *Questions, book 13:* A procurator claimed fifty; should his principal claim one hundred, the sureties, who gave the undertaking on ratification, will be liable for fifty and for what it be worth deferring an action for fifty.

5 SCAEVOLA, *Replies, book 5:* He answered that ratification can be not only by words but by conduct; should the principal, approvingly, continue the proceedings which his procurator had commenced, the stipulation does not become enforceable.

6 HERMOGENIAN, *Epitome of Law, book 1:* When a tutor has been charged as untrustworthy, a defender who wishes to speak on his behalf will be obliged to give an undertaking that his principal will ratify the matter.

7 PAUL, *Views, book 3:* Suppose that one, unwitting that possession of property is being sought for him, dies, his heirs cannot ratify matters within the period of the claim.

8 VENULEIUS, *Stipulations, book 15:* A procurator brought the action for production and his opponent was absolved because he did not have possession; when he does acquire possession of that thing, the principal sues him for production; Sabinus says that

the sureties are not liable as this is a different issue. For even if it were the principal who brought proceedings and, his opponent having been absolved for nonpossession, subsequently [in similar circumstances] raised an action all over again, he would not be met by the defense of *res judicata*. 1. Should a procurator have demanded money and given security that his principal would ratify the matter and soon after the principal sue for the same money and lose the case, the stipulation becomes enforceable; and if a procurator paid the same money without judicial proceedings, a *condictio* for it would lie. However, when the debtor commences proceedings on the stipulation, it can be said that the principal, if he undertakes the procurator's defense, can effectively invoke the defense of bad faith against the debtor since the money remains naturally due. 2. If a person be involved in an issue of status with a procurator, he should obtain security from the latter that he will not be repeatedly sued in respect of his status and that should the procurator's principal and others traceable to him not ratify the matter, then, since the procurator seeks his servitude or he is asserting his liberty against the procurator, he should have made good to him the value of the issue when his freedom has been established, that is, what it is worth to him not to have his status in jeopardy again and his expenses in the suit. Labeo, however, thinks that a specific sum should be included since the computation of the value of freedom extends to infinity. Once the principal does not ratify, the stipulation becomes operative, but not before the issue of freedom has been settled can action on it be taken; because, should he be adjudged a slave, the stipulation is useless since, even if there be any action, it is deemed to be acquired for his master.

9 ULPIAN, *Edict, book 9:* The representative of a tutor always gives security, but in the case of a representative of a city, neither he personally gives security nor do the magistrates of the community, any more than does a curator of assets [of a bankrupt] appointed by the agreement of the creditors.

10 ULPIAN, *Edict, book 80:* A stipulation for ratification is sometimes interposed by agreement, for instance, if a procurator sells or lets something or if performance be made to him,

11 HERMOGENIAN, *Epitome of Law, book 6:* or if there be an agreement [not to sue] or anything be done by him in the name of one not present,

12 ULPIAN, *Edict, book 80:* whereby his position will be more secure, the contracting party usually stipulates for ratification. 1. To hold the matter confirmed is to endorse and acknowledge what has been done by a false procurator. 2. Julian says that when his principal should ratify performance to his procurator, it matters whether this be when he first becomes aware of the fact. This, though, is to be given a liberal interpretation, that is, within a reasonable time and when the issue can be perceived by intellect rather than be enunciated in words. Now what if [the principal] subsequently ratify what he did not initially? It no more militates to obstruct any action by him, and since he did not initially ratify, he will, says [Julian], retain his action intact. Hence, should he claim what has been performed to the procurator, he can proceed on the stipulation as though he had not said that he subsequently ratified. For myself, I think that the defense of bad faith could be invoked. 3. Whether one make a claim or invoke set-off, the stipulation that the principal will ratify becomes operative forthwith; for, however one retract the same act which was effected through a procurator, the stipulation should be enforceable.

13 PAUL, *Edict, book 76:* Should the stipulation on ratification become enforceable, it is operative for as much as my interest amounts to, that is, the amount by which I was deficient and the gain that I could have made. 1. Pomponius says that the undertaking is due where a legacy is paid to a procurator in the absence of judicial proceedings.

14 PAUL, *Plautius, book 3:* Should one of the debtors promise that the principal would ratify or, further, that the matter would not be the object of proceedings, the stipulation becomes enforceable, it must be said, if a claim be raised by one party to the same obligation.

15 PAUL, *Plautius, book 14:* The expression "no further claim," says Labeo, should be interpreted as "no further claim by action." But if a plaintiff has summoned his defendant before the magistrate and taken security for appearances but the proceedings have not yet begun, I do not think that the stipulation for no further claim becomes operative; for this plaintiff is not actually suing but intending to sue; but should the money be paid, even without judicial proceedings, the stipulation is enforceable. Even if someone resort to set-off or deduction against the claimant, he is correctly said to claim and the stipulation for no further claim comes into force. Again, an heir charged not to claim will be liable on the will, should he do any of these things.

16 POMPONIUS, *Plautius, book 3:* Suppose that a sum not owed be paid to a procurator; action against the procurator on this stipulation is immediately possible for ratification by his principal so that it may be ascertained whether the *condictio indebiti* lies against the principal, if he has ratified or rather against the procurator in the event of nonratification. 1. A procurator claimed land and gave an undertaking, as usual, that his principal would ratify the matter; then the principal subsequently sold the same land and the purchaser claimed it; Julian writes that the stipulation for ratification comes into force.

17 MARCELLUS, *Digest, book 21:* Titius proceeded against a debtor for ten in the name of the creditor who ratified the claim in part. It must be said that the obligation is partially consumed, just as though he had stipulated for ten or claimed them and the creditor had confirmed not all but only part of what had been done. Accordingly, in the case of a stipulation, "ten or Stichus, whichever I choose," should Titius, in my absence, claim five for his principal, this will rightly be regarded as done without consequent ratification.

18 POMPONIUS, *Sabinus, book 26:* Should a procurator give an undertaking that his principal or the latter's heir would ratify the matter and one of the principal's heirs do so but the other not, the stipulation undoubtedly is enforceable in respect of the part not ratified, because it is operative for what it is worth to the stipulator. Even if the principal himself were to ratify in part and in part not, the stipulation would be operative only in part for it relates to the interest of the plaintiff. Accordingly, it is possible to proceed more than once on this stipulation according as it is the interest of the plaintiff that he litigates, incurs expense, takes advice, pays up when judgment goes against him, just as can happen with the stipulation against threatened damage, so that he who stipulates sues thereunder; for the undertaking is "whatever may fall down, be demolished, dug, built there." Suppose, then, that some harm ensue thereunder; there will be no doubt that action is possible. For if it were necessary to take proceedings only after all loss had been assessed, it would be as though one does not take action before the time of the stipulation has elapsed within which there is the undertaking in the event of damage. And that is not true.

19 PAUL, *Sabinus, book 13:* In the stipulation whereby a procurator undertakes for confirmation by his principal, the content is what it is worth to the stipulator; the same is true of all clauses on bad faith.

20 ULPIAN, *Disputations, book 1:* Not only in actions which he brings but also in stipulations which he asks to be made if they are to take the place of actions, the procurator should give an undertaking of confirmation. Hence, if the procurator should insert a stipulation for twofold, he should give the undertaking as also if he should take a stipulation against threatened damage.

21 ULPIAN, *Opinions, book 1:* It avails the procurator that he asserts in his written address to the emperor that security is not to be required that ratification by his principal will follow in respect of those matters which he conducts in the name of the person who appointed his procurator. But if security be demanded from a procurator that a judgment will be performed, it is requisite that the provisions of the law be openly complied with.

22 JULIAN, *Digest, book 56:* If, without judicial proceedings, a procurator claimed money which was not due and his principal did not ratify but commenced proceedings for the same money, the sureties are liable, and the *condictio* which lies against the procurator is destroyed if the stipulation [for ratification] had not been taken. For whenever money is paid to a procurator and his principal does not ratify the payment, I think that the consequence is that the person who pays what is not due to a procurator does not have a *condictio* against the procurator but can proceed on the stipulation. Moreover, the sureties must pay the costs incurred in the action. Had the principal ratified the proceedings, the sureties would indeed be released, but the money could be claimed by *condictio* from the principal himself. 1. Now should the procurator have demanded money due to his principal without judicial proceedings, the law would be the same except that in the event of the principal's ratification, there would be no recovery of the money. 2. Were it the case that a procurator exacted before a judge money which was not due, it can be said that whether or not the principal ratified the matter, the sureties are not liable, either because there was no matter for the principal to ratify or because the stipulator had no interest in the ratification; thus the person who pays a procurator suffers a wrong. It is, however, more the case that if the principal does ratify, the sureties are liable. 3. On the other hand, should a procurator claim money due before a judge who has no authority to act, rather are the sureties fully liable in the event of nonratification by the principal. 4. When, however, the procurator makes a valid claim, the principal a false one, the procurator is not answerable that his principal should not recover anything through wrong by the judge; sureties are never liable for wrong by the judge. It is, though, truer that the sureties in such case are liable for nothing but the costs of the suit. 5. MARCELLUS: If the principal should not ratify the matter but loses when proceedings are brought, nothing beyond the costs comes into the stipulation for ratification. 6. JULIAN: The stipulation is operative when legacies are paid to the procurator of one deceased without judicial proceedings, unless the heir ratifies, at any rate, when the legacies are due. For then the stipulator has an undoubted interest in the heir's ratification lest he have to pay twice. 7. Suppose a stipulation for ratification to contain the words "Lucius Titius will ratify"; since it is obviously so effected that the persons of heirs and others to whom the matter would be relevant are not included, if, at least, they should be due, it is difficult to hold that the clause against bad faith becomes operative. When these persons are not included through lack of foresight, an action does lie on the clause against bad faith. 8. A procurator launched a legal claim to an inheritance and then his principal claimed land, part of that inheritance; the stipulation for ratification comes into force because assuming that he was a genuine procurator, the principal could be opposed with the defense that the issue has been decided. Now the stipulation for confirmation mostly becomes operative in those cases in which, if a genuine procurator has conducted the proceedings, an action is not effective for his principal, either by the law itself or through a defense. 9. Someone, in the father's name, brings the action for insult because his son-in-power has been thrashed or beaten. He will have to include the son in the stipulation, especially since it could happen that the father dies before he knows that his procurator has brought the action, and so the action for insult will vest in the son. 10. Moreover, should a grandson be outraged and the grandfather's procurator bring the action for insult on that account, not only the son but also the grandson must be included in the stipulation; for what is there to preclude the death of both father and son before they become aware of the procurator's action? In such case, it would be unjust for the sureties not to be liable in the event of the grandson's bringing the action for insult.

23 JULIAN, *From Minicius, book 5:* A procurator suing for money gave security that there would be no further claim; after proceedings had been accepted, a person came forward who himself claimed the same money as a procurator; the question was this: Since the second claimant was not a procurator and could accordingly be barred by

procuratorial defenses, were the sureties of the first procurator liable? Julian replied: The truer view is that the sureties are not liable; for the stipulation provides that he will not claim who has any action, claim or other proceeding in the matter and that all to whom the matter pertains will ratify his act. This man, however, who is not a procurator, has neither action nor claim.

24 AFRICANUS, *Questions, book 5: Bonorum possessio* acquired through another should be confirmed at the time when it is in such a case that it can be claimed; hence, it cannot be ratified after one hundred days. 1. Let us consider whether there can be ratification when the claimant dies or goes mad; for if everything is to be as though, at the time of ratification, *bonorum possessio* is claimed through that person, ratification in such cases is impossible. It will further be the case that if the principal repents that such person claimed, ratification is impossible; and that would be absurd. Accordingly, it is better to say that neither of the above contingencies prevents ratification.

25 AFRICANUS, *Questions, book 6:* A father, in the absence of his daughter, claims the dowry provided by himself and undertakes that she will ratify; she dies before she can ratify. [Julian] said that the stipulation is operative; for even though it is true that she does not ratify, nevertheless, the restoration of the dowry gives the husband no interest for the dowry should be kept intact for the father even with the daughter dead. 1. When a procurator exacted a debt from one who would be released by the passage of time, he undertook that his principal would ratify the matter; then the principal ratified after a period by which time the debtor was already discharged. He was of opinion that the debtor can sue the procurator, although he is already released; the essence of the matter is that if no stipulation were taken, there would be a *condictio* against the procurator; in place of the *condictio*, however, is the stipulation.

26 . . . : If a procurator claims what is not due and there is litigation over it as though over a debt, the stipulation will become operative when the person, in whose name the procurator acted, claims it.

BOOK FORTY-SEVEN

1

PRIVATE DELICTS

1 ULPIAN, *Sabinus, book 41:* It is the established rule of the civil law that heirs and other successors are not liable in penal actions, and so they cannot be sued for theft. But although they are not liable to the action for theft, they should be liable to the action for production, if they are in possession of or have fraudulently ceased to possess stolen goods; and on production, they will be liable in a *vindicatio*; the *condictio* also lies against them. 1. It is, however, equally established that an heir can bring the action for theft; for in the case of several delicts, heirs are allowed to prosecute claims; thus, an heir can bring an action under the *lex Aquilia*. But the action for insult does not lie to heirs. 2. Not only in respect of theft but also in other actions founding in delicts, be the actions civil or praetorian, it is the rule that liability follows the miscreant.

2 ULPIAN, *Sabinus, book 43:* Where several delicts run together, it is never the case that immunity is given in respect of any of them; nor does one delict reduce the penalty for another delict. 1. Consequently, a man who steals and kills a slave will be liable for the abduction by the action for theft and for the killing by the Aquilian action, and neither action excludes the other. 2. Similarly, if he take the slave by force and kill him, he will be liable to the action for goods taken by force for the former wrong and to the Aquilian action for the killing. 3. The question has been asked whether, having recovered the value of the slave by the *condictio* for theft, the owner can nonetheless proceed by the Aquilian action. Pomponius writes that he can because the Aquilian action proceeds on one basis of assessment and the *condictio* for theft on another; for the Aquilian action comprises assessment at the highest value in the past year while the *condictio* does not go beyond the value at the time of bringing the action. If a slave were the wrongdoer, whichever the action in respect of which he be surrendered as the culprit, the other action will lapse. 4. Again, if someone stole a

slave and whipped him, he would be liable to both actions, that for theft and that for insult; and should he kill him, he would be liable to three actions. 5. Then, if a person abducted another man's female slave and debauched her, he would be liable in both actions, that for making a slave worse and the action for theft. 6. And if someone wounded the slave whom he stole, both the Aquilian action and that for theft would lie.

3 ULPIAN, *Duties of Proconsul, book 2:* When someone wishes to proceed with an action arising from delict, if he wants to have a pecuniary award, he must have recourse to the ordinary law and will not need to launch a criminal prosecution; but if he seeks the extraordinary punishment of the miscreant, he must institute a prosecution against him.

2

THEFTS

1 PAUL, *Edict, book 39:* Theft, says Labeo, derives its name from the dark, that is, from black; it is what happens furtively and by stealth, most frequently by night; for Sabinus, it comes from fraud; or it comes from taking and carrying away or from the language of the Greeks who style thieves φῶραι; indeed, the Greeks derive φῶραι from απὸ τον φέρειν (to take away). 1. Hence, mere theftuous intent does not make a thief. 2. Thus, one who denies the existence of a deposit with him does not at once become liable for theft but only if he conceal the thing with a view to appropriating it. 3. Theft is a fraudulent interference with a thing with a view to gain, whether by the thing itself or by the use or possession of it. This natural law proscribes.

2 GAIUS, *Edict, book 13:* Theft is of two kinds: either it is manifest or it is not manifest.

3 ULPIAN, *Sabinus, book 41:* A thief is manifest whom the Greeks describe as 'επ' αὐτοφώρῳ, that is, one caught in the act of theft. 1. And it makes little difference whether he be caught by the owner of the thing or by someone else. 2. But is a thief manifest only if he be caught in the act or also if he be apprehended elsewhere? The better view is that which appears in the writings of Julian, that is to say, that although he be not taken at the scene of the offense, he will still be a manifest thief if he be taken with the stolen thing, before he has taken it to its intended destination.

4 PAUL, *Sabinus, book 9:* "Destination," for this purpose, means "the place where he aimed to remain that day with the stolen thing."

5 ULPIAN, *Sabinus, book 41:* Consequently, whether he be apprehended in a public place or in a private one, before he gets the thing to its intended resting place, he is in such a case that he will be a manifest thief, if caught with the stolen goods; so wrote Cassius. 1. But if he should have reached his destination, then, although he later be found with his booty, he will not be a manifest thief.

6 PAUL, *Sabinus, book 9:* Although there may be theft where there are frequent interferences, nevertheless, it is to the beginning, that is, the time of the first such interference, that we must look to decide whether the theft be manifest or not.

7 ULPIAN, *Sabinus, book 41:* Suppose a man to have perpetrated a theft while he was a slave but to have been apprehended after he had been manumitted; let us consider whether he be a manifest thief. Pomponius, in his ninth book from *Sabinus*, says no, because the origin of the theft, when he was in servitude, was not manifest. 1. In the same book, Pomponius makes the elegant observation that it is apprehension which makes a thief manifest; hence, if, when I committed theft from your house, you concealed yourself lest I should kill you, although you saw the theft take place, it will still not be manifest. 2. Celsus, though, on the issue of apprehension, adds that if, when you saw the thief in the act and ran to arrest him, he made his escape by discarding his loot, he would be a manifest thief. 3. And he thinks that it is of little consequence whether it be the owner, his neighbor, or any passer-by who makes the arrest.

8 GAIUS, *Provincial Edict, book 13:* What constitutes nonmanifest theft is now apparent; for that which is not manifest is obviously nonmanifest.

9 POMPONIUS, *Sabinus, book 6:* Where a person already has an action for theft, repeated interference with the thing by the thief does not give rise to a further action for theft, not even where the stolen thing has been increased. 1. But if I have brought my *vindicatio* against the thief, I will still have the *condictio*; it can, though, be said that it is within the sphere of the judge who decides the issue of ownership to order restitution of the thing to the owner only if the latter surrender his *condictio*; but if the defendant has already been subjected to an assessment of value in the *condictio*, having been found liable, it will be for the judge in the *vindicatio* either to absolve the defendant or [preferably], if the plaintiff be prepared to refund the assessment but the slave be not restored to him, to condemn the slave's possessor to the plaintiff for the amount that the plaintiff has sworn in the proceedings.

10 ULPIAN, *Sabinus, book 29:* A person who has an interest in the thing not being stolen will have the action for theft.

11 PAUL, *Sabinus, book 9:* The person with such interest will have the action for theft, if the basis of his interest be honest.

12 ULPIAN, *Sabinus, book 29:* And so a fuller who accepts garments for cleaning and attention will always have the action because he is liable for their safekeeping. But if he should be insolvent, the action reverts to the owner; for nothing is at the risk of one who has nothing to lose. 1. But the action for theft is not given to a person in bad faith, even though he may have an interest in the nontheft of the thing, because it is, of course, at his risk; no one acquires an action in respect of his own wrongdoing, and so only a possessor in good faith, not one in bad faith, will be given the action for theft. 2. If a thing given in pledge be taken from the creditor, we grant him the action for theft although the pledge is not one of his assets; indeed, we grant him the action not only against a third person but even against the owner of the thing; and so wrote Julian. Sometimes, the owner also is given the action as when he is not liable for theft and can sue. In such a case, creditor and owner both get the action because each has an interest in the thing. Now does the creditor always have such interest or only when the pledgor is insolvent? Pomponius thinks that he always has an interest, a view endorsed by Papinian in the twelfth book of his *Questions*; and, indeed, it is the more correct view that the creditor be regarded as always having an interest. Julian repeatedly wrote to this effect.

13 PAUL, *Sabinus, book 5:* A person to whom a thing is due under a stipulation does not have the action for theft when the thing is stolen if it was not the debtor's fault that he did not deliver it.

14 ULPIAN, *Sabinus, book 29:* Celsus wrote that a purchaser to whom the thing has not been delivered does not have the action for theft which still lies to his vendor. Of course, the vendor should authorize the purchaser to bring the action for theft, as also the *condictio* and *vindicatio*, and whatever be forthcoming from these actions should go to the purchaser. This is the correct view which is also that of Julian. And, indeed, the thing is at the buyer's risk, save that the seller has the safekeeping of it until delivery. 1. So far is the purchaser not entitled to the action for theft before delivery that the question has been aired whether he could himself be liable to theft proceedings if he remove the thing. Julian, in the twenty-third book of his *Digest*, writes that if the purchaser of a thing, with the safekeeping of which the vendor is charged, should appropriate the thing after the price has been paid, he is not liable to the action for theft. Of course, if he removed the thing before paying the price, he would be so liable, just as if he appropriated a pledge. 2. Moreover, agricultural tenants, although they are not owners, have the action for theft because they have an interest in their holding. 3. Now let us consider whether a person with whom a thing is deposited has the action for theft. Since such a person is liable only for deliberate misconduct, it is held that he does not have the action for theft; for what interest has he, if he abstain from fraud? And if he should act dolosely, though the risk in the thing will then indeed be his, he should not be allowed the action for theft in respect of his own fraud. 4. Julian wrote in the twenty-second book of his *Digest* that since it has been ordained in the case of all thieves that they cannot have the action for theft in respect of what they themselves steal, a depositee will not have the action for theft, even though the thing becomes at his risk when he tampers with it. 5. Papinian deals with this case; if I accept two slaves in pledge in respect of ten gold pieces and one of them be abducted but the other, who remains with me, is worth not less than ten, do I have the action for theft only in respect of five gold pieces because I am secure, in the remaining slave, for the other five, or since he might die, should it not be said that my action will be for ten despite the fact that the slave whom I still have is of great value? His view is that we should not look to the slave who has not been snatched away but to the one who has. 6. Papinian also writes that where ten are owing to me and the slave given to me in pledge for them is stolen, if I should recover for ten in the action for theft, I will not have a second action if the slave be taken off again, since my interest in him ceased when I was successful in the first action. That holds, though, if his abduction was not my fault; for if it were attributable to me, since I would myself be liable to the action for pledge, I would be able to sue for theft. But if I was not at fault, the second action, which does not lie to the creditor, would undoubtedly be available to the slave's owner. This view is approved also by Pomponius in the tenth book of *Sabinus*. 7. These authors further say that if the two slaves be taken away together, the creditor will have the action for theft in respect of each of them not for the whole amount in each action, but for the portion representing his interest when the whole sum due is apportioned between the individual slaves; if, though, the slaves be stolen separately and the creditor recovers in full in respect of one of them, he will recover nothing for the other. 8. Pomponius also says in the tenth book of *Sabinus* that if the person to whom I lent something for use deal fraudulently with it, he will not have the action for theft. 9. He says the same in respect of a person who undertakes to carry something on the request of another. 10. The question arises whether the father whose son has borrowed something has the action for theft. Julian says that he does not because he does not have the duty of safekeeping of the thing; in like manner, he says, the verbal guarantor of a borrower does not have the action for theft. For, he says, it is not everyone who, in the wide sense, has an interest in the thing's not being lost, who has the action

for theft, but the person who is liable in respect of the thing because it has been lost through his fault. Celsus endorses this view in the twelfth book of his *Digest.* 11. If a person gets a *precarium* of a slave and the slave is stolen, it may be asked whether he has the action for theft. Since there is no civil action against him (such a grant being like a gift) and, on that account, the interdict [*de precario*] was thought necessary, he will not have the action for theft. Of course, after the issue of the interdict, I think that he is liable for fault and then he can have the action for theft. 12. And if a person hire a thing, he will have the action for theft, provided that it was through his fault that the thing was stolen. 13. If a son-in-power be stolen, it is patent that his father has the action for theft. 14. If a thing be borrowed and the borrower dies, although there can be no theft from a vacant inheritance and so the borrower's heir cannot sue, the lender can certainly proceed for theft; and the same applies in respect of a thing hired out or given in pledge. For although the action for theft does not lie to the inheritance, it does to someone who has an interest in the thing. 15. The action for theft lies to the borrower not only in respect of the borrowed thing but also in respect of what is connected with it, because he is liable for the safekeeping of that also. Thus, if I lend you a slave, you bring the action for theft also in respect of his clothing, even though I did not lend you the garment he was wearing. In like manner, if I lend you work horses which have a foal, I am of the opinion that you have the action for theft in respect of the foal too, although he was not lent to you. 16. The nature of the action for theft granted to a borrower for use has been in issue. I think that in the case of everyone who has another's thing at his own risk, that is, on loan, on hire, or in pledge, the action for theft is available if the thing be stolen; but the *condictio* lies only to the owner of the thing. 17. If a letter which I sent you should be intercepted, who has the action for theft? The first question is: Whose is the letter, the writer or the addressee? If, indeed, I gave it to the addressee's slave, it immediately becomes his; so also if I gave it to his genuine procurator (for possession can be acquired through a free person); certainly is this so if he has an interest in having it. But if I so sent the letter that it should be returned to me, I remain owner because I did not wish to lose or transfer ownership of it. Who then sues for theft? He who has an interest in the letter's not being stolen, that is, the one to whose advantage the writing pertains, can bring the action for theft. And therefore the question can be raised whether the carrier of it may bring the action for theft. If he be liable for safekeeping of the letter, he can sue, as also if he has an interest in returning the letter. Suppose the letter to have been such that something was to be returned to him or become his; he can have the action for theft, as also if he undertakes safekeeping of it or receives a reward for the delivery. In such a case, he will be like an innkeeper or ship's master; for we give them the action for theft, assuming their solvency, since goods are at their risk.

15 PAUL, *Sabinus, book 5:* A creditor from whom the pledge is stolen can sue for theft not only to the value of the debt but for the full value of the thing; he, however, will be liable, through the action on pledge, to make over to the debtor all excess over the amount of the debt. 1. An owner who takes away the thing in which another has a usufruct will be liable for theft to the usufructuary. 2. Pomponius writes, though, that it is settled that if your lender take away the thing which you borrowed, he will not be liable to you for theft, because you have no interest in the thing and, indeed, are

not liable to the action on loan. Still if you had the right to retain the thing by reason of some expenditure that you had incurred in respect of the thing, you would have the action for theft, even against the owner, if he took it away, because in such a case, the thing would be like a pledge to you.

16 PAUL, *Sabinus, book 7:* That a head of household cannot proceed against his son for theft is not a ruling of the civil law as such; the very nature of the case makes it impossible; for we can no more sue those in our power than we can sue ourselves.

17 ULPIAN, *Sabinus, book 39:* Our slaves and sons-in-power can commit theft against us, but they are not subject to the action for theft; for one who can himself ordain against the thief has no need to litigate with him; accordingly, the action was denied him by the early jurists. 1. The question then arises: If the slave be alienated or manumitted, will he be liable to the action for theft? The accepted view is that he will not; for an action which did not exist from the beginning cannot later come into being against the same thief. Of course, if, after manumission, he should wrongfully interfere with the thing, it must be said that he will be liable to the action for theft because it is now that he commits the theft. 2. However, when I return the slave whom I bought and who was delivered to me, the case is not such that he should be regarded as never having been mine but that he has been and has now ceased to be mine. And so Sabinus says that if he stole from me while with me, the case is such that an action for theft in respect thereof is not possible. But though this be not possible, an account will still be taken of what he did, when about to be returned, in the action for rescission. 3. It has also been queried whether, if a fugitive slave commit theft against his owner, the owner has the action for theft against the person who began to possess the slave in good faith when he had not returned into his owner's power. The question is prompted by the consideration that though I am not liable as owner in an action for theft, as though he were not in my power, I am regarded as possessing the slave while he is at large. That I am deemed so to possess him, writes Julian, is pertinent only to usucapion. And so Pomponius, in the seventeenth book on *Sabinus*, says that the action for theft does lie to the owner of the runaway slave.

18 PAUL, *Sabinus, book 9:* When it is said that liability follows the wrongdoer, this is true in the sense that redress which became available when the deed was done follows the person of the miscreant. And so the Cassians think that if your slave perpetrate a theft from me and, having become his owner, I sell him, I will not be able to proceed against his purchaser.

19 ULPIAN, *Sabinus, book 40:* In the action for theft, it is enough to particularize the thing in a way in which it can be identified. 1. It is not necessary to specify the weight of utensils; it is sufficient to say, "plate, disc, or platter"; but it must be added of what material it is, silver, gold, or whatever. 2. But if one claim unwrought silver, one must state the extent of the mass and its weight. 3. In the case of coined money, the number of coins must be included so that the plaintiff is lacking more or less gold pieces. 4. In respect of garments, it has been asked whether the color should be specified. And it is true that the color should be stated so that as, in respect of utensils, one may speak of a gold platter, so the color of a garment should be declared. Of course, if the plaintiff declare on oath that he simply cannot state the color, he must be relieved of the need to do so. 5. One who gives a thing in pledge and then takes it away will be liable in the action for theft. 6. The owner of a thing given in pledge is deemed guilty of theft of it, not only if he take it from a pledgee possessing or holding

it but even if he removed it after he no longer possessed it, as when he had sold it; for this too, it is settled, is theft on his part. And so wrote Julian.

20 PAUL, *Sabinus, book 9:* When copper be given in pledge but it is said to be gold, although the proceedings be discreditable, there is no theft. But if, having given gold, the debtor then, on the pretext of weighing it or sealing it up, substitute copper, he commits theft. For he has substituted the thing given in pledge. 1. If you buy my thing in good faith and I made off with it or, if you have a usufruct in it and I improperly interfere with it, I will be liable to you in the action on theft, although I own the thing. But in these cases, there is no bar to usucapion of the thing as being, so to speak, stolen, because even if someone else took the thing and it returned into my power, it would be open to usucapion.

21 PAUL, *Sabinus, book 40:* It is a common question whether a person who takes a *modius* from a heap of corn steals the whole heap or only what he removes. Ofilius thinks that he steals the whole heap; for similarly, Trebatius says that one who touches the ear of a person touches the whole person. And in the same way, one who opens a wine jar and abstracts a small quantity of wine therefrom is deemed a thief not only of what he takes but of the whole contents. But the truth is that these people are liable in the action on theft only for what they took. If a man opened a cupboard, too heavy for him to carry away, and handled all its contents and then, having gone away, came back and extracted a particular item but, before reaching his destination with it, was apprehended, he would be both a manifest and a nonmanifest thief of one and the same thing. Again, if a man cut a crop by day and thereby wrongfully interfere with it, he is both a manifest and a nonmanifest thief of what he has cut. 1. If a person deposited a purse containing twenty coins and received another purse containing thirty, the giver being in error, it is settled that he is liable in theft only for ten, if he think that his twenty are included in the purse. 2. If a man steal copper, thinking it to be gold, or vice versa, according to Pomponius in the eighth book on *Sabinus*, his liability may be less rather than more; for he steals what he takes in fact. Ulpian says the same. 3. Again, if one theftuously remove two purses, one containing ten and the other twenty coins, and he thinks one to be his own but knows the other to belong to someone else, we say at once that he commits theft only of the one that he knows to belong to another, just as if he took two goblets, one of which he thought to be his own, the other he knew to belong to a third person, he will commit theft only of one of them. 4. And, whether he think the handle on the goblet to be his or it be in fact so, Pomponius wrote that he is a thief of the whole goblet. 5. But if, from a loaded ship, a person theftuously abstract but a pint of corn, does he steal the whole cargo or only the pint? The question is more easily put in respect of a full granary; it is certainly severe to say that he steals the whole. And, again, what are we to say of a cistern of wine or, for that matter, a cistern of water? Then, in the case of a wine ship (there are many into which the wine is just poured in), what do we say of one who taps the wine? Is he to be held to steal the whole? The better view is that we answer in the negative. 6. Of course, if you put the case of a vintner's establishment from which jars of wine are abstracted, there is a theft of the individual jars not of the whole contents; the same would apply where one of the numerous individual movable items in a warehouse

was removed. 7. A person who enters an enclosure for the purpose of theft is not yet a thief even though he entered for an unlawful purpose. What then? By what action will he be liable? It could be the action for insult or he could be [criminally] charged with violence, if he made a forcible entry. 8. If, again, a person open or break into something of too great weight to be removed, an action for theft will lie against him, not for the whole contents but only for what he removes, because he could not remove the whole thing. In the same way, suppose the man opened a closet that he could not remove in order to steal, and he did handle some of the contents; although he could remove the individual items within it, if he could not remove the whole closet, he would be a thief of the things that he did take but not of the rest. But if he could take the whole receptacle, we say that he is thief of all, even though he opened it to take one or some items; and so says Sabinus. 9. If two or more removed a single beam which, individually, none of them could have managed, it must be said that all of them are liable in full for theft, although each alone could not move or theftuously deal with the thing; and that is the law which we apply; for it cannot be said that the individuals are thieves in part; they steal the one thing together; so it comes about that each is liable for theft. 10. Although a man may be liable in theft for things that he does not take, a *condictio* will not lie against him in respect of those things; and that, because it is a thing which has been removed for which a *condictio* will lie. And Pomponius also wrote to this effect.

22 PAUL, *Sabinus, book 9:* If a thief broke or fractured something which he handled without the intention of stealing it, he could not be sued for theft in respect of it. 1. If a chest be broken into so that, say, pearls may be removed and they are handled with theftuous intent, it is only of them that theft may be held to be committed; this is true. The remaining things, set aside to get at the pearls, are not tampered with for the purpose of their theft. 2. A person, who scrapes off a platter, steals the whole of it and is liable in the action for theft for the owner's full interest.

23 ULPIAN, *Sabinus, book 41:* Julian wrote in the twenty-second book of his *Digest* that an *impubes* can commit theft, if he be already capable of guilty intent; similarly, it is possible to proceed against such a person for damage wrongfully inflicted since theft can be committed by him. But, he says, there is a limit on this; for it does not apply to infants. Our view is that one can proceed with the Aquilian action against an *impubes* capable of fault. What Labeo says is also true, that is to say, that an *impubes* is not liable as an accomplice in respect of a theft.

24 PAUL, *Sabinus, book 9:* No less can the *condictio* be brought against an *impubes*, writes Julian.

25 ULPIAN, *Sabinus, book 41:* It is true, as most writers testify, that there can be no theft of land. 1. Therefore, it has been asked whether one forcibly evicted from land can have a *condictio* against the evictor. Labeo says: "No"; but Celsus is of opinion that there can be a *condictio* of possession of the land just as in respect of a movable thing which is stolen. 2. But of those things taken from land, such as trees, stones, gravel, or fruits which someone removes with theftuous intent, there is no doubt that he can be sued for theft.

26 PAUL, *Sabinus, book 9:* If wild bees make a honeycomb in a tree on your land and someone removes the bees or the comb, he will not be liable to you for theft because they did not belong to you; the same is true of things caught on land, sea, or in the air. 1. Again, it is settled that an agricultural tenant at a money rent will have the action for theft against the man who takes his standing crop, because it became the tenant's as soon as the miscreant cut it.

27 ULPIAN, *Sabinus, book 41:* One who takes away documents or *cautiones* is liable in theft not only for their intrinsic value but for what they represent, which means the amount of the sum contained in the document, if, that is, their interest is that great; thus, if a document records a sum of ten gold pieces, we say that that is the sum to be doubled. But what if it be seemingly valueless, recording a payment received, should there not be an assessment of the value of the materials only? For what other value does it have? Yet it can be said that because debtors not infrequently seek to recover their notes, since no less infrequently they are falsely alleged not to have paid, the creditor has an interest in the document as averting controversy over the matter. Generally, it is to be said that the plaintiff should have double the value of his interest in the document. 1. Then it can be asked whether, if a person has other proofs and a record of the account when he suffers the theft of his document, the value of the document as such should be doubled. Why not, indeed, since the plaintiff has no other interest? For what disadvantage can he face when he can establish the debt from other sources, as where the document is recorded in two copies? Nothing seems to be lost if it be the case that the creditor has the security of the other document. 2. Again, if a receipt be stolen, it must be said that there will be an action for theft for the value of it; but, in my view, it has no value if there be other evidence that the money has been paid. 3. But if a person does not remove a document of this kind but defaces it, not only the action for theft will lie but also the Aquilian action; for one who defaces is regarded as destroying.

28 PAUL, *Sabinus, book 9:* If a man steal a document before defacing it, he will be liable for the owner's interest in not having it stolen; the defacing adds nothing to the penalty.

29 ULPIAN, *Sabinus, book 41:* Moreover, an action for production can be brought and the interdict for *bonorum possessio,*

30 PAUL, *Sabinus, book 9:* if testamentary documents be defaced.

31 ULPIAN, *Sabinus, book 41:* If someone deface a portrait or book, he is again liable for damage wrongfully caused as if he had destroyed it. 1. If someone take or deface documents of a *res publica* or a municipality, Labeo says that he is liable to the action for theft; he says the same in respect of other public bodies and of corporations.

32 PAUL, *Sabinus, book 9:* There are those who think that only an assessment of the value of the materials of a document should be made in an action for theft because, if it be provable to the judge in the action for theft how much was due, that can also be proved before the judge in an action to claim the amount; and if it cannot be proved in the trial of the action for theft, then there cannot even be established the plaintiff's interest in the document. But having recovered the document after the theft, the individual can be a plaintiff to prove thereby what would have been his interest if the document had not been stolen. 1. In respect of the *lex Aquilia,* the principal problem is, how his interest can be established; for if it may be established by other means, he has suffered no loss. What, then, if, say, money be advanced conditionally, the fact of which might be proved by persons who might die before the condition be realized? Or suppose me to have thought something due to me and, because I do not have present witnesses and signatories who have knowledge of the fact, and, being defeated, I lose

the case. I can now utilize, when I sue for theft, their knowledge and their presence to testify to the existence of the loan.

33 ULPIAN, *Sabinus, book 41:* A tutor does have the administration of the estate of his *pupillus*, but he is not allowed to pillage it; hence, if he should take something with a view to theft, he commits theft, and the thing is incapable of usucapion. And he is liable to the action on theft, even though he is also liable to the action on tutelage. What has been written in relation to the tutor of a *pupillus* applies also to the case of a *minor* and to other curators.

34 PAUL, *Sabinus, book 9:* One who is an accomplice in a theft never finds himself liable for manifest theft; it can happen, thus, that a person, who is liable as an accomplice, is guilty of nonmanifest theft, while the person apprehended is liable as a manifest thief in respect of the same matter.

35 POMPONIUS, *Sabinus, book 19:* If someone accept a thing to deliver and he should know it to be a stolen thing, it is settled that with that knowledge, he alone is, if apprehended, a manifest thief; if not, he is neither sort of thief because he is not a thief and has not been apprehended. 1. If one of your slaves drew off some liquid and got away with it while another was caught in the act of siphoning off, you will be liable for the former as a nonmanifest, in the case of the other, as a manifest thief.

36 ULPIAN, *Sabinus, book 41:* One who persuades a slave to run away is not a thief. For one who gives another evil counsel of this sort is no more liable for theft than one who advises another to throw himself from a height or to kill himself; such conduct does not give rise to the action for theft. But if one person persuade the slave to run away, so that he may be taken by a third person, the persuader will be liable for theft as an accomplice. Pomponius writes further that although the persuader is not guilty of theft in the meantime, he does become so liable when someone becomes thief of the slave, the theft being regarded as committed with his connivance. 1. Likewise, it is accepted that one who abets his son, slave, or wife in the commission of a theft is liable for theft, even though the principal cannot be sued in the action for theft. 2. Pomponius also says that if a runaway slave takes goods with him, the person who incited him can be sued in respect of the goods as an accomplice of the actual wrongdoer. Sabinus is to the same effect. 3. If two slaves incite each other and run away together, neither is thief of the other. But what if they hide one another? Can it be that they are thieves then, one of the other? It can be said that each steals the other just as, if third persons took them individually, they would be liable as if each had abetted the other; in like manner, says Sabinus, each would be liable also for goods which the other carried away.

37 POMPONIUS, *Sabinus, book 19:* If, when my tame peacock escaped from my house, you chased it so that it disappeared, I could have the action for theft against you if someone else should take it.

38 PAUL, *Sabinus, book 9:* The mother of a son who is stolen has no right of action. 1. In respect of free persons, although an action for theft will lie, there will be no *condictio.*

39 ULPIAN, *Sabinus, book 41:* It is true that if someone abduct or conceal the prostitute slave-woman of another, this is not theft; one must look not to the fact but to the motive thereof, and that is not appropriation but lust. Hence, if a man forces an entrance to a prostitute's quarters out of lust and thieves, not introduced by him but entering separately, remove the woman's goods, he will not be liable for theft. But will a man who conceals a harlot for lust be liable under the *lex Fabia*? I think not and said so when it once happened. He acts more heinously than does a thief, but the ignominy

that he thereby incurs makes up for that; certainly, he is no thief.

40 PAUL, *Sabinus, book 9:* A man who takes horses which he has borrowed further than he should or who uses another's property without the owner's consent is guilty of theft.

41 ULPIAN, *Sabinus, book 41:* If theft be committed against one in the hands of the enemy and he returns with *postliminium*, one may say that he has the action for theft. 1. Of course, an *adrogator* can take proceedings for theft in respect of a theft committed against the person he adrogated before the fact of *adrogatio*. In respect of a theft after *adrogatio*, there is no doubt. 2. So long as the thief is alive, the action for theft is not extinguished; for either the wrongdoer is independent, and the action lies against him personally, or he has entered into the power of another, and the action for theft lies against the person who has power over him. This is what is meant by "liability follows the wrongdoer." 3. We must consider whether the action is extinguished if, after committing a theft, the wrongdoer becomes a slave of the enemy. Pomponius writes that the action is so extinguished but that it should revive if he returns through *postliminium* or in some other way; and that is the rule which we observe.

42 PAUL, *Sabinus, book 9:* If, without his master's authority, a slave takes charge of a ship, in respect of any goods lost on board, the ordinary formula will be granted against the master but, in respect of the misdeeds of others, "to the extent of the slave's *peculium*"; in respect of the slave operator's own wrongdoing, there is added: "to surrender him noxally." And if the slave should have been manumitted, an action in respect of the *peculium* will continue available against the master for a year while the delictal action will lie against the freedman himself. 1. It sometimes happens that both the person manumitted and the manumitter are liable for theft, if the manumission was effected to avoid the action for theft; but if proceedings be taken against the master, Sabinus says that the freedman is automatically released from liability as if the decision had been made.

43 ULPIAN, *Sabinus, book 41:* A false creditor, that is, one who pretends to be a creditor, commits theft if he accepts payment; and the money does not become his. 1. A false procurator, too, is regarded as committing theft. But Neratius says that we must consider whether this view be true but subject to a distinction; if the debtor gave him those coins with the intention that those very coins should be taken to the creditor by him, the proposition is true, if the procurator appropriate them; for the coins remain the property of the debtor since the procurator does not accept them in the name of the person whom the debtor wishes to have them and, by appropriating them without the owner's will, he undoubtedly commits theft. But, says Neratius, if the debtor so gave the money that it should become the procurator's, then in no way does he commit theft since he receives the coins with the owner's consent. 2. If a man, receiving a payment not due to him, should ask that it be made to someone else, there will be no action for theft against him, if he were not present when the payment was made; the case, though, would be different if he were present and he would be guilty of theft. 3. If a man does not lie with respect to his identity but does use words misleadingly, he is a fraud not a thief; for example, he says that he is wealthy or that he intends to put the money he receives into trade or that he will provide suitable verbal guarantors or that he will make speedy repayment of the money. In all these instances, he is guilty of deception, not theft, and so he cannot be sued for theft. But since he has been fraudulent, the action for fraud will lie against him, unless some other action be available. 4. A man who, for personal gain, takes away a thing belonging to another is guilty of theft, whether he knows the identity of the owner or not; for it in no way minimizes the fact of theft that the owner of the object is unknown. 5. If its owner has abandoned something, I will not commit theft of it, even though I take it with theftuous intent; for there can be no theft without an owner of the object; in the case posited, the thing belongs to no one; for the view of Sabinus and Cassius has commended itself that

a thing ceases to be ours as soon as we abandon it. 6. Even if the taker only thought it abandoned when it was not, he would not be liable for theft. 7. And if he picked up a thing, just lying there, which was not and which he did not think to be, abandoned, with the object not of personal profit but of returning it to its owner, he would not be guilty of theft. 8. That being so, let us consider the case that not knowing whose it was, he took it, intending to return it to the person who claimed it or proved that it was his; is he guilty of theft? I think not. For there are many who do this sort of thing and put up a notice saying that they have found the thing and will return it to the claimant; such persons show that they have no theftuous intent. 9. But what if the finder claim a reward, ἑυρετρα, as it is called? I do not think that even he commits theft, although his asking for something is conduct not to be condoned. 10. If someone deliberately discards or jettisons a thing, but not with the intention of abandoning it, and you take the thing, are you liable for theft? That is the question posed by Celsus in the twelfth book of his *Digest*. He says that if you thought that it was abandoned, you will not be so liable; but if you did not think that way, he says that there is room for doubt; still, on the whole, he would say that there is no liability in theft because there cannot be a deliberate appropriation of what another deliberately discards. 11. If a person take what is jettisoned from a ship, is he liable for theft? The issue turns on whether the goods are abandoned or not. If the mind of the jettisoner were such that since he expected that the goods would be lost and thus that whoever found them would appropriate them, a not unreasonable general assumption, there would be no theft. But if he were not of that mind but of the conviction that if the thing survived, it would still be his, then it could be taken away from the finder. And if the latter had an idea that this was so but took the thing with theftuous intent, he would be liable for theft. If, though, he took it with a view to preserving it for its owner, he would not be liable for theft. Nor would he be if he thought it to have been simply discarded. 12. Even if I become part-owner of a slave who previously stole something of mine, the better view is that though I am owner only in part, my right of action is ended; for if from the outset a person had a share in the thieving slave, he would have no action for theft. Of course, if I acquired a usufruct in such slave, it must be said that I would not lose my right of action because a fructuary is not an owner.

44 POMPONIUS, *Sabinus, book 19:* If the false procurator of a creditor receive something from a third person on the debtor's instructions, he is personally guilty of theft from the debtor and the coins remain the debtor's property. 1. If I should give you, as being yours, a thing which you know to be mine, the better opinion is that you are guilty of theft, if you accepted with a view to gain. 2. If a slave, being part of the estate of a deceased whose heir has not yet accepted the inheritance and, moreover, being manumitted in the will, should steal from the estate, he will be liable to the action for theft since there was no time when the heir was his owner.

45 ULPIAN, *Sabinus, book 41:* If an owner in common commit theft of a thing (for a common owner can certainly commit such a theft), it must be said that without doubt, the action for theft lies.

46 ULPIAN, *Sabinus, book 42:* It is universally accepted that even though the stolen thing no longer exists, the action for theft is still available against the thief. And even if a stolen slave be dead, the action for his theft lives on. Nor does manumission extinguish the action; for manumission is not unlike death in the matter of depriving a master of his slave. It thus emerges that however the slave be taken away from his master, the action for theft nonetheless survives against the thief; and that is the rule which we observe; the action lies not because he is now absent but because he ever was away to the thief's advantage. The same applies also in respect of the *condictio*; for the thief can be sued by *condictio*, although the thing, for whatever reason, no longer exists. The same is to be said, if the thing has fallen into the hands of the enemy; it is settled that an action for theft may be brought in respect of it. Indeed, even if the owner has subsequently abandoned it, he can nonetheless bring the action for

theft. 1. If a fructuary slave be stolen, both the fructuary and the owner have the action for theft. The action is thus divided between fructuary and owner; the fructuary sues for twofold the value of the fruits or for his interest in the slave's not being stolen; the owner for his interest in his property not being stolen. 2. When we say "twofold," that should be understood as "fourfold," if the theft be manifest. 3. This action should be held competent also for one who has only the use of the slave. 4. And if it be advanced that a person had the slave pledged to him, then the pledgee also has the action for theft in respect of him; but the debtor also has the action if the slave be worth more than the amount of the debt. 5. But the actions available to the different parties are such that if one compound with the thief, it must be said that only he loses his cause of action; but the other's survives; hence, if a slave, jointly owned, be stolen, as you suggest, and one of his owners compound, the other, who did not do so, still has his action for theft. 6. Again, the owner has the action for theft against his usufructuary if the latter do anything to conceal or suppress the fact of ownership. 7. It is rightly said that no one who thinks the owner to consent to his dealing with the thing is guilty of theft; for how does a person deal dolosely with a thing, when he thinks the owner to be in agreement, whether his belief be sound or unfounded? He alone is a thief who tampers with a thing in the knowledge that its owner would not consent. 8. The converse case: I think that I am doing something without the owner's consent when, in fact, he is amenable; the question is: Do I commit theft? Pomponius says that I do; but the truth is that if the owner be agreeable to a course of conduct, although the other party does not know it, that other will not be liable for theft. 9. If a stolen thing return to the control of its owner and then be stolen again, the owner will have a second action for theft.

47 PAUL, *Sabinus, book 9:* If, for some reason, the ownership of a stolen thing should change, the action lies to the present owner, say, an heir or a *bonorum possessor*, an adoptive father, or a legatee.

48 ULPIAN, *Sabinus, book 42:* Someone lost a silver vase and brought the action for theft in respect of it; a dispute arising over the weight of the vase, which the plaintiff put higher than it was, the thief produced the vase and the plaintiff, to whom it belonged, promptly appropriated it. The thief was nevertheless condemned for double its value, and the decision was undoubtedly correct. For in the penal action, the stolen thing itself does not come into issue, whether the action be for manifest or for nonmanifest theft. 1. A person who knows who is the thief, whether or not he names him, is not himself a thief; for it is of great significance whether a person conceals a thief or simply does not point him out. One who merely knows the identity of a thief is not himself a thief; one who conceals a thief is. 2. A person who receives a slave with the owner's consent is, beyond dispute, neither a thief nor a kidnapper; who could be described as a thief, who holds with the owner's agreement? 3. If a person took a thing, when forbidden by the owner to do so, he would not be a thief, if he had no intention of concealing it; but once he did so conceal it, he would be a thief. So one who takes but does not conceal a thing is no thief even though he lacks the owner's authority. We regard as a prohibiting owner one who does not know, one, in short, who does not actively agree. 4. If I charged you by the contract of hiring with cleaning a garment and you, without my knowledge or against my wish, lent the garment to Titius from whom it was stolen, you would have the action for theft in respect of it, because you were liable for its safekeeping, and I would have a similar action against you because you should not have lent the garment and, by doing so, you committed theft; it can thus happen that even the thief himself has an action for theft. 5. If a slavewoman be stolen who is already pregnant or who conceives while in the thief's hands, her child is also stolen property, whether born in the thief's ménage or that of a possessor in good faith. In the latter case, however, the action for theft ceases to lie. If,

though, the woman conceived while in the household of the possessor in good faith, the situation would be that the child would not be a stolen thing and could be usucapted. The same holds good of stolen animals and their issue. 6. Foals born of stolen mares rightly become at once the property of a possessor of the mares in good faith because they are regarded as fruits, but the offspring of a slave-woman is not similarly regarded. 7. If a thief should sell the thing he stole and then the owner of the thing should forcibly extort the purchase money from the thief, it was correctly ruled that the owner was guilty of theft; he would also be liable to the action for things taken by force. No one can doubt that what is acquired by reason of a stolen thing is not itself thereby stolen property; accordingly, a coin which derives from the sale of stolen property is not itself stolen.

49 GAIUS, *Provincial Edict, book 10:* It sometimes happens that there is no action for theft available to the person who has an interest in the safety of the thing. For example, a creditor does not have the action if a thing be stolen from his debtor, even though the creditor has no other effective security for the debt; we are, of course, talking of something which has not been specifically assigned in pledge. 1. In like manner, in respect of dotal property, though it be at the wife's risk, it is the husband, not the wife, who will have the action for theft.

50 ULPIAN, *Edict, book 37:* In the action for theft, it is not the plaintiff's interest which is quadrupled or doubled but the true value of the thing. And even though the thing no longer exist at the time of judgment, nevertheless, condemnation is to be made. Again, if the thing has deteriorated, assessment is to be directed to the time of the actual theft. But if it has become more valuable, it is twofold the higher value which should be the basis of assessment, because the better view is that the theft still continues. 1. Celsus says that a theft has been committed with one's complicity not only when what one did was to enable one's associates to steal but also if it were done through ill-will to the victim. 2. Pedius rightly says that just as no one can be a principal in theft without guilty intent, equally no one can be an accessory without similar intent. 3. A person is deemed to be an accomplice, as adviser, who persuades, directs, and, by instruction, gets the theft committed; a man gives assistance, who provides aid or assistance at the actual taking of the goods. 4. If a man wave a red flag and cattle rush off to fall into the hands of thieves, assuming that he has a malicious intent, he is liable to the action for theft. But even if he did not so act with theftuous design, he should not go unpunished for such pernicious conduct; hence, Labeo writes that an *actio in factum* should be given against him.

51 GAIUS, *Provincial Edict, book 13:* If the cattle should fall over a cliff, an action for damage wrongfully caused, on the analogy of that under the *lex Aquilia*, will be given.

52 ULPIAN, *Edict, book 37:* If someone abet a woman removing her husband's goods, he will be liable for theft. 1. And if he commit theft with her, he will be liable for theft, even though she cannot be sued. 2. A wife herself, who gave aid to a thief from her husband, would be liable to, not the action for theft, but that for the removal of goods. 3. Whether she could be liable in respect of her slave so doing is no matter of doubt. 4. The same applies to a son-in-power who is a soldier. Although he would

personally not be liable to his father in an action for theft, he can be so liable in respect of a slave, part of his *peculium castrense*, if the slave should steal from his father. 5. But we must consider whether I can validly proceed against my son who has *peculium castrense* and who steals from me; for he does have the means to satisfy a judgment. It can be argued that action is possible. 6. Let us see whether a father can be liable to his son, if he should steal something of the son's *peculium castrense*; I think that he can; for he not only steals from his son but is liable in respect thereof. 7. Mela says that a creditor who does not return the pledge when the debt has been paid is liable for theft, if he holds on to the thing with a view to concealing it; I think that Mela is right. 8. If there be sulphur pits on land and a third person should enter and abstract some sulphur, the owner of the land will have the action for theft; but the tenant of the land, by the action on hiring, will then secure that the proceeds of the theft action be transmitted to him. 9. If your slave or son accept clothes for cleaning, it may be asked whether you have the action for theft. If the slave's *peculium* be solvent, you can have the action, but if it be insolvent, the answer must be that the action is not open to you. 10. If a person unwittingly buy a stolen thing and it be stolen from him, he will have the action for theft. 11. It is said by Labeo that if a person tells a corn merchant to give flour to anyone who may come and ask for it in his name and a passer-by who heard this does so ask, and get the flour, it is against him, not against me, that the corn merchant will have the action for theft; for the merchant conducted his own transaction, not mine. 12. If a person secure the release of my runaway slave as his own from a *duumvir* or other officials having authority over prisons or places of custody, is he liable for theft? The correct view is that if he gave verbal guarantors, I have an action as owner against the officials for them to make available their actions to me; but if they took no guarantors but handed over the slave as though to his owner, I, the true owner, will have the action for theft directly against the wrongdoer. 13. If someone knock gold or silver coins or some other thing out of a person's hand, he will be liable for theft, if he did this for others to pick the coins up and they did so. 14. If someone steal my unwrought silver and make goblets, I can have the action for theft and the *condictio* in respect of either the goblets or the metal. The same applies for grapes, must, and grapeskins; for I can have the action for theft and the *condictio* in respect of the grapes, the must, and the skins. 15. A slave who asserts that he is free, in order to obtain an advance of money, does not commit theft; for he does no more than assert that he is a suitable borrower. The same is true of a son-in-power who states that he is a head of household, the more easily to procure a loan. 16. In twenty-second book of his *Digest*, Julian writes that if someone accept money from me to pay to my creditor and, since he owes the creditor the same amount, he pays it over on his own behalf, he is guilty of theft. 17. If Titius sells another's thing and receives the price from the purchaser, he does not commit theft of the coins. 18. If there be two partners in a partnership of all assets and one receive a pledge which is then stolen, Mela says that only the recipient, not the other partner, has the action for theft. 19. No one commits theft by word or writing; our rule is that there can be no theft without wrongful physical interference; again only in such a case will aiding and abetting import liability. 20. If someone drove off my male ass and set him loose among his own mares to impregnate them, he will not be guilty of theft unless he has a theftuous intent; I gave this reply to my pupil, Herennius Modestinus, who consulted me from Dalmatia concerning horses to which a man was alleged to have submitted his mares for the same purpose, that he would be liable for theft if he had guilty intent, otherwise an *actio in factum* would lie. 21. I wish to lend money to a respectable Titius and you present to me a penniless Titius, as if he were opulent, and then share the money with him; you will be liable for theft since theft is committed through your advice and assistance; Titius will also be liable for theft. 22. Someone lent you heavier weights when you were buying by weight; Mela writes that he will be

liable to the vendor for theft as also will you if you are aware of the facts; for you do not acquire the goods with the owner's consent when he is in error over the weight. 23. If someone persuaded my slave to remove his name from, say, a document of purchase, Mela wrote, and I think, that I can proceed against him for theft. 24. But if the slave were persuaded to transcribe my document, then, if the slave be suborned into doing so, the action for making a slave worse would lie; if the inciter himself made the copy, the action would be that for fraud. 25. If a string of pearls be stolen, the number of them must be stated. So also, if proceedings for theft are taken in respect of wine, it must be specified how many flagons were taken. If receptacles be stolen, their number must be asserted. 26. If my slave, who had free administration of his *peculium*, should make a nongratuitous compact with someone who had stolen an item from the *peculium*, that should be seen as a valid *transactio*; for although the action for theft would lie to the master, the matter relates to the slave's *peculium*. Should the full penalty of double the value be paid to the slave, the thief will undoubtedly be released from liability. It follows that if the slave receives from the thief what is regarded as adequate compensation, there is deemed to be a regular *transactio*. 27. If someone aver an oath that he did not commit theft and subsequently wrongfully appropriate the stolen thing, the owner, though his action for theft is indeed destroyed, will retain his proprietary redress. 28. If a slave be stolen who has been named as heir in a will, the plaintiff, in the action for theft, will recover also the value of the inheritance, if the slave be dead before he could accept the estate at his master's direction. So also with the *condictio*. 29. If a *statuliber* be stolen or the object of a conditional legacy and the condition be satisfied before the inheritance is accepted, there will be no action for theft because the heir no longer has an interest; but while the condition is pending, assessment is to be made on the basis of what he would fetch from a purchaser.

53 (52.30) ULPIAN, *Edict, book 38:* If someone forcibly remove something from a house which has no occupant, he may be sued by the action for goods taken by force for fourfold or for nonmanifest theft; obviously, in the event of no one catching him in the process of depredation.

54 (53) PAUL, *Edict, book 39:* If someone break open a door by way of insult, then, although things are thence removed by others, he will not be liable for theft; the intention and purpose of the delinquent distinguish the offenses. 1. If a slave who has been lent steal something and the borrower be solvent, Sabinus says that the action on loan is possible against the borrower as also the action for theft against the owner in the name of the slave. But if the money demanded by the owner be paid, the action for theft disappears; the same is true if the owner waives his action on the loan. 2. But if your own slave steal something which you have borrowed, there will be no action for theft against you, the thing being at your risk; but only the action for loan will lie. 3. One who applies himself to the affairs of another will not have the action on theft, although the thing would be lost at his risk; but he will be condemned in the action for unauthorized administration only if the owner cedes to him the action for theft. The same is to be said of one who acts as a tutor or of a tutor who owes a duty of care, for instance, a tutor being one of several named in a will who, having given due security, undertakes sole administration of the ward's estate. 4. If you hold something of mine because a third person gave it to you and I take it away, Julian says that you could have the action for theft against me, only if you have an interest in retaining possession of it; instances would be that you defend the donated slave in noxal proceedings or give him attention when sick, so that you would have a good ground for retaining the slave against one asserting title to him.

55 (54) GAIUS, *Provincial Edict, book 13:* If a creditor make use of the pledge, he is liable for theft. 1. When a person to whom something was lent for use himself lent it to a third person, the ruling was that he was guilty of theft. It adequately emerges

from this that theft appears to have been committed if a person appropriate to his own profit the use of another's thing. One should not be disturbed by the seeming fact that he does nothing for personal profit; it is a form of gain to make large with another's property and thereby to acquire a debtor who is under obligation to one. Thus, a person is liable for theft who removes a thing to give it to a third party. 2. The *Law of the Twelve Tables* allowed a man, caught by day in the act of theft, to be killed only if he defended himself with a weapon. The term "weapon" comprises a sword, club, stone, and generally anything which could inflict harm. 3. Since the action for theft looks to the recovery of a penalty, while the *condictio* and *vindicatio* lie for the recovery of the thing, it is clear that though the thing be recovered, the action for theft remains intact while the other two remedies become otiose; conversely, though the penalty of fourfold or twofold may have been paid, the *vindicatio* and *condictio* remain intact. 4. One who knowingly lends implements for the breaking-in of a door or a cupboard or who, equally, lends a ladder for getting in will be liable to the action for theft, although there was no initial counsel on his part for the commission of the theft. 5. If a tutor who administers the estate, or a curator, make a *transactio* with the thief, the action for theft lies no more.

56 (55) ULPIAN, *Disputations, book 3:* When a creditor removes a thing pledged to him, he is not regarded as wrongfully appropriating the thing but as looking after his pledge.

57 (56) JULIAN, *Digest, book 22:* Sometimes, a thief becomes bound again in certain cases, while already liable to penalty, so that it is possible to proceed against him several times for theft of the thing. The first instance occurs where the ground of possession is changed, as when the thing has returned into its owner's control and the same thief steals it again, whether from the same owner or from the person to whom he has sold or lent it. But if the identity of the owner has changed, another liability is created. 1. One who takes a thief before the prefect of the watch or the provincial governor is deemed to have chosen the manner in which he wishes the issue to be dealt with. And if the matter is ended there, and the thief being condemned, the amount of the stolen money is recovered, the action for theft is removed; certainly so, if not only is the thief ordered to restore the stolen thing but the judge adjudicate something more against him. But even if he be ordered to do no more than return the stolen thing, by the very fact that the thief had been in danger of a greater punishment, the action for theft ceases to lie. 2. If a thing, part of a *peculium*, return into the control of the slave, the theftuous taint of it is purged, and it thereby becomes part of the *peculium* again and in the possession of his master. 3. When a slave abstracts with theftuous intent a thing which is part of his *peculium*, so long as he holds it, its legal state is unchanged (for the master loses nothing); but if he deliver it to someone else, he commits theft. 4. An administering tutor can make a *transactio* with the thief, and if he recovers the stolen thing into his control, it is no longer a stolen thing; for a tutor is in the position of an owner. The same must be said if the curator of a lunatic, who so far has the role of an owner that even by delivering a thing belonging to the lunatic, he is deemed to alienate it. A tutor and the curator of a lunatic can also bring a *condictio* for stolen goods in the name of the *pupillus* or lunatic. 5. If two of your slaves steal a garment and some silver, one action for theft lies against you for the garment, another for the silver; no defense to the second will be granted on the ground that proceedings have already been brought over the garment.

58 (57) ALFENUS, *Digest, Epitomized by Paul, book 4:* If someone dig a hole to remove lime and he does remove it, he is a thief, not for digging but for taking.

59 (58) JULIAN, *Urseius Ferox, book 4:* If theft be committed against a son-in-power, he may, on becoming a head of household, properly take proceedings in respect thereof. The same would apply, granted the same circumstances, where a hired thing had been stolen from him.

60 (59) JULIAN, *From Minicius, book 3:* If a person, having lent a thing, should stealthily take it away from the borrower, he cannot be sued for theft because he is taking back his own property and the borrower will be under no liability on the loan. At least, this is so if there be no circumstances which give the borrower a right to retain the thing; for if the borrower made necessary expenditure in respect of the thing, he would have a greater interest in keeping the thing in his hands than in bringing the action on loan, and in such a case, he would have the action for theft.

61 (60) AFRICANUS, *Questions, book 7:* Just as a runaway slave-woman is regarded as stealing herself, so she makes her child a stolen thing.

62 (61) AFRICANUS, *Questions, book 8:* If a slave owned in common should commit theft from one of his owners, the correct view is that proceedings should be by the action for dividing common property, and it will be for the judge's discretion to decide that his loss be made good by the other co-owner or that the latter give up his share. It can be seen to follow that likewise, if he should alienate his share, he can proceed for theft against the purchaser so that, in a way, the delictal action follows the person of the wrongdoer. This, says [Julian], is not to be carried to the length that we should say that proceedings could be taken against the slave personally if he should become free, any more than they could be if he had been the victim's exclusive property. It thus becomes obvious that if the slave be dead, there is nothing for which the victim can claim, unless perhaps his co-owner has derived some benefit from the thing stolen. 1. [Julian] follows up by saying that if, again, the slave whom you gave me in pledge should commit theft against me, I will recover by the counteraction on pledge, so that either you pay the damages or abandon the slave to me as having been noxally surrendered. 2. The same is to be said of one sued for rescission of a contract of sale, so that, just as the purchaser has to return any accessions to or fruits of the thing, so the vendor will be under obligation either to accept condemnation or to leave the slave with the purchaser as being noxally surrendered. 3. Further to all this, if a person knowingly give a thief to an unsuspecting creditor by way of pledge, in every way, he will have to make good any loss suffered by the pledgee; for this is in accord with the dictates of good faith. 4. In an action on purchase, it has particularly to be queried what sort of slave the vendor promised. 5. In the matter of a mandate, [Julian] says, there is room for doubt whether it should be equally said that all loss should be made good, but in fact, the principle should hold good even more than in the cases already discussed; so that, even if the person, who asked that a particular slave be purchased for him, did not know that the slave was a thief, he is nonetheless liable in full; for the person who accepted the mandate to purchase could, with every justification, say that he would not have incurred loss, if he had not accepted the mandate; the result is even more obvious in the case of deposit. For, although, other things being equal, it appears equitable that a person should not incur, through a slave, greater loss than the slave himself is worth, it is still more equitable that no one should be at a loss by reason of a transaction which he entered into for the benefit of the other party and not for his own. And just as in the contracts previously discussed—sale, hire, and pledge—it is to be said that the fraud of one who knowingly conceals the facts should be penalized, so in these cases, fault should be to the disadvantage of the person for whom the contract is made and not to that of the contracting party. And certainly, in the case of mandate, it is fault on the part of the mandator to request the purchase of such a slave, as also for a depositor not to be more circumspect in giving warning of the kind of slave that he is depositing. 6. In the matter of loan for use, a different view may properly

be taken, clearly, since only the benefit of the borrower is in issue. Hence, just as in letting and hiring, the lender will, if he be in any way dolose, not lose more than the value of the slave in which connection we should not be too punctilious in determining what is fraud because, as said, the lender derives no benefit from the transaction. 7. All this I think to be true, provided that the mandatory or depositee has not himself been remiss; if such a person should have entrusted the slave with the care of silver or coins, when, in no circumstances, would his master have done so, a different opinion must be adopted. 8. I let you some land and (as is customary) it was agreed that its produce would be in pledge to me in respect of the rent. If you were stealthily to remove the produce, [Julian] used to say that I can have the action for theft against you. Equally, if you sold the standing crop to someone who took it away, we say that it becomes a stolen thing. Crops, while in the soil, are part of the land so that a tenant makes them his own, because he is regarded as gathering them with the owner's consent. One certainly cannot say the same in the case just put; for by what reasoning can they be held to become the tenant's property when the purchaser reaps them for himself? 9. In a noxal action, an heir defended a *statuliber* who was to become free if he gave ten; while the action was pending, the man, having given ten to the heir, became free; the issue was raised whether absolution in the action could be effected only if the heir gave the ten to the plaintiff. [Julian] thought it relevant to know whence the money came; if it came from a source other than the *peculium*, the heir should make it over because, if the slave had not yet attained his liberty, he would have been noxally surrenderable to the plaintiff; but if it came from the *peculium*, the decision would be the converse because he would be giving the heir money which, in other circumstances, he would not allow to be given him.

63 (62) MARCIAN, *Rules, book 4:* A man does not become a thief by pointing out the way to a runaway slave.

64 (63) MACER, *Public Prosecutions, book 2:* The provincial governor cannot bring it about that a convicted thief does not incur *infamia*.

65 (64) NERATIUS, *Parchments, book 1:* A slave, by legacy charged on the heir, Titius, to Seius, committed a theft from Titius before the latter had accepted the inheritance. If, after such acceptance, Seius wishes the slave to be his property, Titius can bring the action for theft against him in respect of the slave because the slave did not belong to Titius at the time of the theft and (for all that one may think that if a slave becomes the property of the person from whom he stole, the action for theft so disappears that even if he again be alienated, it will not be possible to bring proceedings on the theft) he did not become the property of Titius, on his acceptance of the inheritance, because things bequeathed pass directly from the testator to the legatee.

66 (65) ULPIAN, *Curule Aediles' Edict, book 1:* One who appropriates another's thing with a view to his own gain is a thief, even if, changing his mind, he later returns it to the owner; no one ceases to be guilty by his own repentance over such a wrong.

67 (66) PAUL, *Plautius, book 7:* Even though he owns the thing, if a man sell the thing which he has given in pledge, he commits theft, whether he actually delivered the thing to his creditor or charged it by special pact; and so thinks Julian. 1. Suppose that a man from whom something was stolen bequeathed it to me while it was in the thief's hands; if the thief subsequently handle it again, do I have the action for theft? According to the opinion of Octavenus, the action for theft will lie to me alone; for the heir does not have the action on his own account, because, whatever the ground of change of ownership, it is certain that it is the current owner who can sue for theft. 2. The older jurists held that a man who, with wrongful intent, summoned a muleteer before the magistrate was guilty of theft, if the mules disappeared. 3. Julian ruled

that if a slave cashier asked for payments after being manumitted, he was guilty of theft. *Mutatis mutandis*, the same may be said of a tutor to whom payment is made after the *pupillus* has reached puberty. 4. If you commend Titius to me as a suitable person to whom to advance money and I make inquiries about Titius and then you bring forward someone else as being Titius, you commit theft because I believe him to be Titius, that is, if the person you present is aware of all the circumstances; if he is not aware, however, you do not commit theft, nor can the other person be said to be an accomplice, because no theft has been committed; but an *actio in factum* will be given against the person who presented him. 5. If I stipulate from you that "it shall not be through your fault that the slave Eros is not given to me by the first of such-and-such month," although I have an interest in his not being stolen (for if he be stolen, you will not be liable on the stipulation, provided that it is not your fault that he has not been handed over), nevertheless, I do not have the action for theft.

68 (67) CELSUS, *Digest, book 12:* No one commits theft by denying a deposit (for the denial in itself is not theft, though it is close to it); but if a person takes possession of the thing deposited with a view to appropriating it, he does commit theft. It is irrelevant whether he wears the ring on his finger or has it in a jewelbox, if, when he holds it as a deposit, he decides to hold it as his own. 1. If something be stolen from you which you had promised under penalty to deliver by a certain date with the result that you have to pay the penalty, that can be taken into the assessment in the action for theft. 2. A stolen slave-child grew up in the hands of the thief; the latter was thief of the adolescent no less than of the infant, and the theft is all one. Hence, the thief will be liable for twofold the highest value that it has ever had in his hands. Granted that he can be sued only once for the theft, what is the relevance of that for the question before us? If the slave were stolen from the thief and he recovered him from the second thief, then, even though he has committed two thefts, he can be sued only once. I have no doubt that it is the value of the adolescent not of the child that should be looked to. What could be more absurd than to think that the thief's position is improved by the continuance of his offense? 3. When the sale of a purchased slave goes off, the purchaser cannot proceed for theft against the vendor in respect of something which the slave stole from him after the sale but before he was returned. 4. A runaway slave stole a stolen thing from the thief; it is right that the thief should have the action for theft on that account against the slave's owner so that the offenses of such slaves shall not bring them immunity and be a source of profit to their owner; for often by such thefts, the *peculia* of these slaves are increased. 5. If, after the five years of his lease, an agricultural tenant takes further crops without the owner's consent, can he be sued for theft of the corn and vintage? I have no doubt that he is a thief, and if he consumes what he steals, the value of it can be recovered from him.

69 (68) MARCELLUS, *Digest, book 8:* Julian said that there can be no theft of a thing, part of a vacant inheritance, unless, say, the deceased had pledged it or given it on loan

70 (69) SCAEVOLA, *Questions, book 4:* or someone has a usufruct in it.

71 (70) MARCELLUS, *Digest, book 8:* In these latter cases, he thought that there could be theft against the inheritance, the things could not be usucapted, and consequently, the heir could have the action for theft.

72 (71) JAVOLENUS, *From Cassius, book 15:* If a person steal a thing which he has borrowed, he can be sued both for theft and on the loan; but if the action for theft be brought, that on the loan is extinguished; if the action for loan were brought, it would be a defense to the action for theft. 1. Where someone possesses as heir a vacant inheritance, although he can usucapt, he will not have the action for theft if something be stolen from it, because a person can sue for theft who has an interest in the thing's not being stolen and he is regarded as having an interest when he stands to lose not to gain.

73 (72) MODESTINUS, *Replies, book 7:* Sempronia prepared a document to give to the centurion for transmission to the office, but she did not carry out her intention. Lucius recited its contents in court as if it had been delivered to the office; the document could not be found in the office, nor was it delivered to the centurion. My question is: What wrong may be asserted against one who had the temerity to read in a court a document, taken from a private house, which had not been given to him? Modestinus replied that if he took it by stealth, theft had been committed.

74 (73) JAVOLENUS, *From Cassius, book 15:* A person who sells a thing pledged to him, when no agreement had been made that he have a power of sale, or, his debt remaining unpaid to him, sells before the time when he would be authorized to sell it, makes himself guilty of theft.

75 (74) JAVOLENUS, *Letters, book 4:* I bought a stolen slave-woman in good faith for two gold pieces, and when she was in my possession, Attius stole her from me. Now both her owner and I are suing Attius for theft. I ask what should be the basis of computation for each of us? The reply is: For the purchaser, double his interest; for the owner, double the woman's value. We should feel no concern that a penalty for theft is to be awarded to two people; for where reparation is made in respect of one and the same thing, the purchaser's justification for an award is his possession of the thing, the owner's, his very title to it.

76 (75) POMPONIUS, *Quintus Mucius, book 21:* If a man, pretending to be another's agent, contrive that I promise something to him personally or to someone to whom he requests me to do so, I am not able to sue him for theft because there is no thing which has been dealt with, with theftuous intent.

77 (76) POMPONIUS, *Quintus Mucius, book 38:* One who uses a thing which he has borrowed or which was deposited with him otherwise than on the terms on which he accepts it, will not be liable for theft, if he believe that he is not acting contrary to the owner's will. In no way will he be liable on a deposit. On the question whether he be liable on a loan there will need to be an evaluation of fault on his part. Should he not have believed that the owner would allow what he did? 1. If someone steal another's thing and then someone steal what he has taken from him, it is the owner who can proceed for theft against the second thief, not the first thief; the reason is that it is the owner, not the first thief, who has an interest in the safety of the stolen thing. This is what Quintus Mucius says, and it is correct; for though the thief has an interest in its safety, since he will be liable to a *condictio* for its value, nevertheless, the interested party who brings the action for theft must have an honest interest. We do not follow the opinion of Servius who held that if no owner of the stolen thing is or will be forthcoming, the thief should have the action for theft; the thing is still not to be regarded as his who is profiting by it. In the result, it is the owner who will have the action for theft against both thieves in such wise that his commencement of proceedings against one does not obstruct the continued availability of an action against the other; the same applies to the *condictio*, since each defendant is liable in respect of a different act.

78 (77) POMPONIUS, *Readings, book 13:* A person who takes a purse of coins is liable

also in respect of the purse, although it was not his intention to steal the purse.

79 (78) PAPINIAN, *Questions, book 8:* A person gave another something to inspect; if the thing were at the recipient's risk, he could bring the action for theft if the thing were taken.

80 (79) PAPINIAN, *Questions, book 9:* If a debtor steal the thing he gave in pledge, what he pays in the action for theft in no way reduces his debt.

81 (80) PAPINIAN, *Questions, book 12:* If I have sold but not yet delivered a slave and, without my fault, he has been stolen, the better view is that I have the action for theft; I should be seen as having the interest in the slave because I am his owner or because I will be liable to yield up actions I have regarding him. 1. Although the action for theft never lies unless we have an interest in the thing, when it is brought on the ground of ownership, my interest must be related, unless it be greater, to the value of the thing; this is evidenced in the case of *statuliberi* and conditional legacies. Any other test would make the amount difficult to determine. And so mere interest is the basis of valuation only in those cases where the action is not grounded on ownership, where the action cannot rest on the full value of the thing itself. 2. If I brought the action for production to choose a slave bequeathed to me and one of the body of slaves from which I was to choose had been stolen, the heir would have the action for theft because he would have the interest; and it is irrelevant on what ground the obligation of safekeeping was due. 3. Since a robber in any case commits theft, he is to be regarded as a manifest thief. 4. But a person through whose wrongful conduct the thing was snatched away would be liable not in the action for theft but in that for things taken by force. 5. If Titius, in whose name a false procurator wrongfully accepts money, ratifies the transaction, Titius himself will have the action for unauthorized administration; the person who paid the money will have the *condictio* for money not due against Titius and against the false procurator the *condictio* for theft; if he choose to sue Titius, the latter may fairly plead the defense of fraud to require him to make over his *condictio* for theft. But if the money was due, the action for theft disappears because the debtor is released from his obligation. 6. A false procurator only steals the money when, posing as the genuine procurator whom the creditor has, he tricks another's debtor. The same applies to one who asserts that money is payable to him as the heir of Sempronius, when the heir is in fact someone else. 7. A person acting on behalf of Titius paid money in his name to the false procurator of his creditor, and Titius ratified the payment; Titius does not get the action for theft, which arose for the payer immediately the money was paid, because Titius had neither ownership nor possession of the coins; Titius will indeed have the *condictio* for what was not due and the payer that for theft; this latter will be surrendered to Titius by the judge's direction, if he be sued by the payer in the action for administration.

82 (81) PAPINIAN, *Replies, book 1:* The action for theft, not the criminal charge of peculation, lies when money is taken from civic funds.

83 (82) PAUL, *Views, book 2:* If a fuller or tailor who receives clothes for cleaning or repair should use them, he would be seen to commit theft of them by this improper use, because he does not receive them for that purpose. 1. When crops are taken from land, both tenant and owner can bring the action for theft because each has an interest in their recovery. 2. One who abducts a slave-woman, not a prostitute, out

of lust will be liable to the action for theft and, if he conceals her, will be liable to the penalty of the *lex Fabia*. 3. One who steals documents or contractual records will be liable in theft for the amount recorded in them; it does not matter whether they have or have not been canceled, because they are the simplest proof of payment.

84 (83) NERATIUS, *Replies, book 1:* If a man appropriates as heir things from the estate of one whom he thinks to be dead, when he is in fact alive, he does not commit theft. 1. When a person has been sued for theft on his own account, he will not, if an action lies against him, in respect of something else as the owner of a slave, be given a defense of theft once committed.

85 (84) PAUL, *Neratius, book 2:* Although a stolen thing cannot be usucapted unless it return into the owner's control, if its value, assessed in action, be paid or the owner sell it to the thief, it must be said that there will be no barrier to the right of usucapion.

86 (85) PAUL, *Handbook, book 2:* A person who has an interest in the thing's not being stolen will have the action for theft, if he holds the thing with the owner's consent, for example, if it be let to him. But someone who conducts affairs unasked or as a tutor, as also an actual tutor or curator, will not have the action in respect of a thing stolen through his fault. Again, a person to whom a thing is due under a stipulation or a will does not have the action for theft, although he has an interest in the thing's safety, nor does the verbal guarantor of an agricultural tenant.

87 (86) TRYPHONINUS, *Disputations, book 9:* If a thing, stolen or taken by force, return to the owner who is unaware of the fact, it is not regarded as returning into the owner's possession, and so, even if, after such possession by the owner, it be sold to a purchaser in good faith, usucapion will not follow.

88 (87) PAUL, *Decrees, book 1:* A creditor has the action for theft for the full value of the pledge, not simply the amount of the debt. But if it be the debtor himself who stole the pledge, it is accepted instead that he would be liable in theft for the amount of the debt and interest thereon.

89 (88) PAUL, *Concurrent Actions, sole book:* If someone proceed by the action for things taken by force, he cannot also take proceedings for theft; but if he first choose to proceed for twofold on theft, he can also have the action for things taken by force, so long as he does not recover more than fourfold over all.

90 (89) PAUL, *Civilian Penalties, sole book:* If a freedman or a client steal from the patron or a hired laborer from his employer, he commits theft but no action for theft arises.

91 (90) JAVOLENUS, *From the Posthumous Works of Labeo, book 9:* A fuller is released from the action on the contract [of hire by the owner]; Labeo says that he cannot then validly bring the action for theft. Again, if he brought theft proceedings before himself being sued on the contract and, before judgment in the action for theft, he be released from liability on the contract, the thief must be absolved as against him. But if none of this has yet happened, the thief must be condemned to him. All this, because he has the action for theft only insofar as he has an interest. 1. No one can give aid and advice to another, who cannot himself have a theftuous intent.

92 (91) LABEO, *Plausible Views, Epitomized by Paul, book 2:* If, when he knows that something is being stolen from him, a man does not prevent it, he cannot have the action for theft. PAUL. Quite untrue; for if someone knows that he is being robbed and, because he cannot prevent it, lies low, he can proceed for theft. But if he could prevent it and did not, he still can have the action for theft. It is in this way that a patron commits theft against his freedman or one held in awe from one who is restrained

from offering resistance by modesty in his presence.

93 (92) ULPIAN, *Edict, book 38:* It must be remembered that now criminal proceedings for theft are common and the complainant lays an allegation. It is not a kind of public prosecution in the normal sense, but it seemed proper that the temerity of those who do such wrongs should be punishable on extraordinary scrutiny. Still if that be the party's wish, he can bring civil proceedings for theft.

3

INCORPORATED MATERIAL

1 ULPIAN, *Edict, book 37:* The *Law of the Twelve Tables* does not allow one to extract a stolen beam from a building or to vindicate one connected with vines (the statute prudently thus effects it that buildings should not on this account be destroyed and that viniculture should not be disturbed); but the statute gives an action for twofold against one found to have made such an incorporation. 1. The term "beam" comprises any material from which buildings are constructed or which are necessary in a vineyard. Hence, some say that there are included also tiles, stones, bricks and so forth, if they be useful for buildings (for the term is derived from "covering"), so that, further, lime and sand are comprised in the definition. Again, in the case of vines, the term includes anything necessary for the vines, such as poles and supports. 2. But the action for production will also be given, for there should be no leniency for a person who built into or bound to a building something which he knows to be another's property. However, we proceed against him not as being in possession of it but as having deliberately contrived no longer to possess it.

2 ULPIAN, *Sabinus, book 42:* But if you assert that proceedings have been taken in respect of stolen materials incorporated into a building, there can be deliberation whether, quite separately, a *vindicatio* for them lies. I have no doubt that it does.

4

A SLAVE, DIRECTED IN THE WILL TO BECOME FREE, IS ALLEGED TO HAVE STOLEN OR DESTROYED SOMETHING AFTER THE DEATH OF HIS OWNER BUT BEFORE THE INHERITANCE HAS BEEN ACCEPTED

1 ULPIAN, *Edict, book 38:* If it be alleged that through the guile of a slave, directed to be free, something be done, after the death of his master and before acceptance of the inheritance, whereby something from the estate of the manumitter does not come into the hands of the latter's heir, an action for twofold will lie against him for a year of days on which business can be done. 1. This action, as Labeo wrote, rests on natural equity rather than on the civil equity, there being indeed no civil action; it is by nature fair that he should not go without penalty who was made the bolder by the expectation that, as he judged, he could not be punished as a slave by reason of his imminent free status nor yet be condemned as a freeman because he had stolen from the inheritance, that is, of his mistress; a master or mistress cannot have an action for theft against his or her own slave, even though he later become free or be alienated, unless he thereafter deal wrongly with something. In consequence, the praetor took the view that the cunning and effrontery of those who despoil inheritances should incur a twofold penalty. 2. A freedman will be so liable only if he be alleged to have made away with something by deliberate wrongfulness. Remissness or negligence on the slave's part is

condoned once he is free, though gross carelessness is one with wrongful intent. Accordingly, if he unintentionally inflicted any damage, this action will not lie although he would otherwise be liable under the *lex Aquilia* for any damage that he might do. Again, the action with which we are concerned has definite limitations, namely that our man acted wrongfully and in the period between his owner's death and the heir's acceptance of the inheritance. But if the slave acted with deliberation or even without, while the master was alive, he would not be liable to this action; indeed, if he did what he did after both the death and the acceptance of the inheritance, this action would have no place. For once the acceptance be made, he can be sued as a freeman. 3. But what if he receives his liberty under a condition? He is clearly not yet free; he can, though, be punished as a slave and so it must be said that there is no scope for our action. 4. Where liberty is immediate, however, it must be said that this action can and should be brought against the slave who has become free. 5. If a slave, the object of an unconditional legacy, tamper with anything which is part of the inheritance, before it has been accepted, it must be said that the present action lies, since the ownership of the slave has changed. 6. Generally, we may say, wherever ownership of the slave is changed or lost or the slave becomes free, within a modest period from the acceptance of the inheritance, this action should be granted. 7. Now if the slave be granted freedom under a *fideicommissum* and he commit any wrong to something, part of the estate, why should the heir be obliged to free him before he has made satisfaction for the wrong? It has been repeatedly ruled by the deified Marcus and by our own emperor and his father in rescripts that there is no impediment to freedom, given unconditionally by *fideicommissum*. However, the deified Marcus, in his rescript, said that an *arbiter* should be given before whom an account could be put. Now this rescript relates to the proferring of an account of the activities of the slave. Therefore, I am of the view that our action would lie. 8. "Before acceptance of the inheritance," we should interpret as "before acceptance by any one of the heirs"; for if only one accept, the result is the slave's freedom. 9. Suppose a *pupillus* to have been instituted heir and, on his death, freedom to be given by the heir substituted to him and, in the meantime, improprieties occur; if, indeed, anything were done while the *pupillus* was alive, there would be no room for our action; but if it were done after his death but before his substitute succeeded, this action would lie. 10. The action is relevant in respect of not only those things which were among the testator's assets but also those in which the heir had an interest that they, through fraud, should not be prevented from coming to him. Hence, Scaevola considers more liberally that if the slave should steal a thing which the deceased had in pledge, this praetorian action would lie. For in this context, we treat goods liberally in terms of their usefulness. After all, if the praetor provided this action in place of the unavailable action of theft, by reason of the thief's servile status, the probability is that it is applicable in all cases where theft proceedings would be possible. And in short, it is acceptable that the action lies in respect of things pledged or held in good faith, though not owned; so also for a thing lent to the testator. 11. In the same way, if the slave, who sees liberty in the offing, interferes with fruits gathered after the testator's death, this action will lie. And the same must be held if issue are born [to slave-women] or young [to animals] after the death. 12. Then again, if an *impubes* acquire the ownership of something after his father's death, and it be stolen before anyone accepts the inheritance of the *impubes*, it must again be said that this action lies. 13. But, really, the action lies in respect of everything in which the heir has an interest in its non-removal. 14. The action is relevant not only in respect of thefts but in respect of any harm which the slave occasions to the inheritance. 15. Scaevola says that theft is made of what is possessed so that if the thing has no possessor, there is no theft; thus, there cannot be a theft from the inheritance which has no possession, which is a matter of both fact and intent. But, equally, the heir does not, as such, have possession because succession entitles him only to the right to the inheritance, not to the possession of it by that fact. 16. It is, though, true that if the heir has some other way of coming to what is his, this praetorian action is not to be given to him, since condemnation will be in terms of his existing interest. 17. In addition to this action, the *vindicatio* is also available; for our action is analogous to that for theft. 18. Accordingly, it must be said that this action is open to heirs of

the original plaintiff and any other of his successors. 19. If several slaves are given their liberty and do something dolosely, each is separately liable in full, that is, for twofold. And, since they are sued in delict, then, as in theft, none is released by the fact that one has been sued and has paid.

2 GAIUS, *Provincial Edict, book 13:* If the slave, somewhat before he achieves his destined liberty, remove or destroy something, the owner, unaware thereof, does not have this action. Hence, in particular, although an heir does not know that something has been taken or destroyed by a *statuliber* or if the same be the case with any other owner in respect of his slave, he can invoke no action after the slave's becoming free, even though, in many other circumstances, pardonable ignorance merits condonation.

3 ULPIAN, *Edict, book 13:* Labeo was of opinion that where a slave conditionally manumitted took something, if the condition were speedily realized, the malefactor could be sued by this action.

5

THE ACTION FOR THEFT AGAINST SHIPS' MASTERS, INNKEEPERS, AND LIVERYMEN

1 ULPIAN, *Edict, book 38:* If a theft be said to have been committed by those who operate ships, inns, or livery stables or by anyone whom they have on their ship or premises, an action will be given, whether the theft be committed by the act and intent of the shipper or of those who were on the ship to sail her. 1. This last we must take to include those aboard for the ship to run, that is, the crew. 2. The action is for twofold. 3. When something be lost at an inn or on a ship, the shipper or the innkeeper is bound by the praetor's edict so that it is in the power of the victim of the theft, as he chooses, to go against the shipper at praetorian law or to bring the civil law action against the actual thief. 4. But if the innkeeper or the ship's master has guaranteed the safety of the goods, it is he and not the owner of the stolen thing who will have the civil action for theft because, by his guarantee, he incurs the risk of safekeeping. 5. But where the shipper is sued in respect of a slave, he can absolve himself by surrendering the slave noxally. Now why is the shipper not condemned personally since he allows so evil a slave on his ship? And why, if he be fully liable for theft by a free member of the crew, is he not liable also for a slave? The reason must be that in engaging a freeman, it is for him to weigh up what manner of man he is, but in the case of his own slave, such evaluation by him may be waived, as for an offense ashore, if he be prepared to surrender the slave noxally. If, though, someone else's slave is involved, he will be liable as for a freeman. 6. The innkeeper is answerable for the deeds of those whom he has in the inn to run the establishment as also of those who reside in the inn; he is not answerable for the acts of passing travelers. For an innkeeper or liveryman is not regarded as choosing his own traveler and cannot refuse those making a journey; but in a way, the innkeeper does select his permanent residents, since he does not reject them, and so should be answerable for what they do. In the case of a ship, there is no liability for the acts of passengers.

6

IF A FAMILY OF SLAVES BE SAID TO HAVE COMMITTED THEFT

1 ULPIAN, *Edict, book 38:* The praetor propounded a most valuable edict whereby to safeguard masters against the delicts of their slaves, namely that if several commit a

delict, masters shall not be stripped of their patrimony by being obliged to surrender them all noxally or to pay damages in respect of each of them. By this edict, the ruling is given that if he indeed be willing to declare the slaves guilty, he may surrender noxally all who took part in the theft; but if he should prefer to make monetary redress, he may offer only what would be due if one freeman had committed the theft, and keep his body of slaves. 1. This concession is made to the master, however, only where the theft took place without his knowledge; if he were privy to the delict, it is not open to him. In such case, he can be sued in respect of himself and by the noxal action of each individual slave, and he cannot make satisfaction by the one amount that a freeman would have to pay. We take him to be privy who knows what is going on and does not prevent it. For we must look to knowledge which also comprises willingness. If the master has knowledge and forbids the slaves who, however, carry on, it must be said that he may avail himself of the benefit of the edict. 2. If several slaves wrongfully inflict damage, it is wholly equitable that the master should have the same concession. 3. When several slaves steal the same thing and issue is joined with the master in respect of one, the action in respect of the others should remain viable until, in the present proceedings, the plaintiff recovers what he would have obtained if one freeman had stolen from him,

2 JULIAN, *Digest, book 23:* that is a twofold penalty and a *condictio* for the value of the thing.

3 ULPIAN, *Edict, book 38:* Whenever the master has paid what would be due if one freeman had been the culprit, the action in respect of the others no longer lies, not only against him but also against the purchaser, if one of the joint wrongdoers shall have been sold. So also if he be manumitted. But if recovery had been made from the now freedman, then the action will be given against the master in the name of the family. For it cannot be said that what was paid by the freedman was, so to speak, paid for the whole family. Of course, if a purchaser makes satisfaction, I think that the action against the vendor should be refused; for in a sense, satisfaction has been made by the vendor against whom [the purchaser] has sometimes had recourse, especially if he had warranted that the slave was free of theft and noxal liability. 1. The question arises whether, if action has been brought against the legatee or heir in respect of a slave who had been bequeathed or donated, action can also be brought against the owner of the rest; I think that it can. 2. The relief envisaged in this edict is afforded not only to the man who, being condemned when in possession of the slaves, makes good what would be due if one freeman had been the thief but also to him who is condemned because it is through his fraud that he no longer possesses them.

4 JULIAN, *Digest, book 22:* This action, open to the testator himself, lies also to the heirs of one from whom several of the one family of slaves have stolen, so that all will recover no more than would be due if a freeman had perpetrated the theft.

5 MARCELLUS, *Digest, book 8:* A body of slaves owned in common committed a theft with the knowledge of one of the owners; an action can be brought against him in respect of all, but against the innocent owner only to the extent stated in the edict. What the second owner makes good, not in respect of the whole family, he will recover in part from the other. And if a slave owned in common inflict damage on the instructions of one owner, what is made good by the other, if action can be taken against him also under the *lex Aquilia* or the *Twelve Tables*, he will recover from his co-owner in similar manner to when harm is inflicted upon common property. Now if we have but two slaves in common, against the one of us who knows what is done, action will lie in respect of each slave; but he will recover from his partner no more than if he had paid in respect of one; if the victim prefer to sue the innocent owner, he recovers only

twofold. Let us see whether an action should not be given to him against his co-owner in respect of the other slave, as if he had made good in respect of all; otherwise, in this case, the praetor's provision would operate harshly; and the party with knowledge should not get leniency.

6 SCAEVOLA, *Questions, book 4:* Labeo thinks that if my co-heir obtained twofold because someone's family of slaves stole something from the estate, that should not prevent my suing for twofold; but there would thus be a fraud on the edict, and it would be unjust that our heirs should get more than we would ourselves. 1. He also says that if the deceased obtained less than twofold, the individual heirs can properly take proceedings. Scaevola replies: I think it more correct that each heir should sue for part but that, including what the deceased received, neither heir should get more than twofold.

7

TREES SECRETLY FELLED

1 PAUL, *Sabinus, book 9:* Should trees be secretly felled, Labeo says that an action can be given both under the *lex Aquilia* and under the *Twelve Tables*; but Trebatius says that each should be so granted that the judge in the second action should deduct what the plaintiff recovered in the first action and condemn for the balance.

2 GAIUS, *XII Tables, book 1:* But it should be known that those who cut down trees, especially vines, are punishable also as brigands.

3 ULPIAN, *Sabinus, book 42:* The majority of the early jurists thought that vines fell within the description "tree." 1. Ivies and reeds are not improperly styled trees. 2. The same applies to willows. 3. But if one plant willow shoots to develop a willow grove and, before they take root, they are cut down or pulled up, Pomponius correctly says that there can be no action for trees felled, because a thing cannot properly be regarded as a tree unless it develops roots. 4. But if someone transfer a tree, root, and branch from a nursery, although it does not yet, as it were, hug the soil, Pomponius, in the nineteenth book on *Sabinus*, approves its being regarded as a tree. 5. Hence, also that is deemed a tree, the roots of which have died. 5a. However, the roots of a tree are not comprised in the term "tree," although embedded in the soil; this view has Labeo's approval. 6. Labeo also says that that is rightly called a tree which, though uprooted, can be replaced or which is so transferred that it can be planted. 7. On the better view, the stock of the olive is a tree whether or not it has yet thrust out roots. 8. And so the action for felled trees may be brought in respect of all these things which we have listed.

4 GAIUS, *XII Tables, book [1]:* There is certainly no doubt that if the plants be so slender that they are like grass, we cannot speak in terms of trees.

5 PAUL, *Sabinus, book 9:* To fell comprises not only cutting down but striking for the purpose thereof. Circling is bark-stripping. Cutting away from below implies that the act has been already done; for a person cannot be regarded as felling who cuts with a saw. 1. The ground of this action is the same as of that under the *lex Aquilia.* 2. A usufructuary of land does not have this action; but one with a long lease of public land does, as also the actions to ward off rain water and for regulating boundaries.

6 POMPONIUS, *Sabinus, book 20:* If several secretly fell the same tree, each is liable in full individually. 1. But if the tree belongs to several owners, one single penalty will be due to them together. 2. If a tree project its roots into a neighbor's land, the neighbor will not have the right to cut them back, but it will be possible for him to claim that the neighbor has no right to have them incorporated in his land (like beams or a projecting roof). Even though a tree be nourished by roots in a neighbor's land, it remains the property of the person on whose land it first grew.

7 ULPIAN, *Edict, book 38:* Those trees are regarded as secretly felled which are cut down without the owner's knowledge and with a view to concealing the fact from him. 1. And Pedius says that this action is not one for theft; for it is possible to cut down trees secretly without theft. 2. A man who pulls up a tree, root and branch, is not liable to this action; for he does not cut it down in any manner; but he will be liable under the *lex Aquilia* as though he had broken it. 3. Even though the tree has not been totally felled, the action will lie as if it had been. 4. Whether a man fell, bark, or cut down a tree with his own hands or tell a slave to do it, he will be liable to the action; so also if he told a freeman to do it. 5. But if the master did not order the slave, who did the cutting down on his own initiative, Sabinus says that the master will be noxally liable as in the case of other delicts; that opinion is true. 6. Though penal, this action is perpetual but does not lie against an heir; it is granted to the heir or other successors of the owner. 7. The condemnation is for double,

8 PAUL, *Edict, book 39:* the basis of assessment being the owner's interest in not being injured; the value of the trees as such will come in and an assessment be made of anything over and above. 1. He fells secretly who fells stealthily. 2. Hence, if he cut the tree down and appropriated it for gain, he will further be liable for theft of the wood and to the *condictio* and the action for production. 3. One who forcibly fells with the owner's knowledge is not subject to this action.

9 GAIUS, *Provincial Edict, book 13:* If it be an agricultural tenant who felled the trees, he will also be liable to the action on letting. But, of course, the plaintiff will have to be content with one action.

10 JULIAN, *From Minicus, book 3:* If it be a twin tree and the join appears above ground, it is held to be a single tree. But if the join be not visible, there are as many trees as there are kinds of them above ground.

11 PAUL, *Edict, book 22:* But if action be brought under the *lex Aquilia* for felled trees, the interdict against force or stealth having issued, the defendant will be absolved if the condemnation in the first proceedings bore heavily enough on him; the action under the *Twelve Tables*, however, remains available.

12 JAVOLENUS, *From Cassius, book 15:* A man can still bring the action in respect of trees felled, even though he has sold the land.

8

GOODS TAKEN BY FORCE AND ON TUMULT

1 PAUL, *Edict, book 22:* A person who forcibly takes something is liable for both nonmanifest theft for twofold and for taking goods by force for fourfold. If the action for taking by force be brought first, the action for theft will be refused; but if the action for theft be brought first, the other will lie to recover the balance available.

2 ULPIAN, *Edict, book 56:* The praetor says: "If any loss be said to have been inflicted with deliberate wrongfulness by armed men on someone or if his goods be said to have been forcibly taken, I will grant an action against the person alleged to have done this. And if a slave be said to have done it, I will grant a noxal action against his master." 1. By this edict, the praetor makes provision against what is done by force. For if someone can show that he has been subjected to force, he can initiate a public prosecution for force; and there are those who think that a public prosecution should not be prejudiced by a private action. It seemed more advantageous, however, that although it be prejudicial to the *lex Julia de vi*, nonetheless, the action should not be refused to those preferring to seek private redress. 2. A person can act with deliberate wrongfulness (the words of the edict) not only when he seizes something himself but also when with premeditation he gathers about him armed men for the purpose of inflicting damage or of committing robbery. 3. Hence, whether the men he uses for robbery be gathered by himself or by someone else, a man is held to act with deliberate wrongfulness. 4. We must understand by "gathered men" men so gathered to do harm. 5. Nothing further is specified, such as of what type, whether freemen or slaves. 6. We use the plural even if only one man has been engaged. 7. Again, if you assert that only one person did harm, I do not think that the expression is incorrect; we should interpret the words to cover a man who uses force alone or with a gang and, in the latter case, whether they be armed or not, so that he is liable under this edict. 8. The mention of deliberate wrong here includes force; for a person who uses force acts deliberately; but a person who acts deliberately does not always use force. Hence, in the present case, deliberation includes force; and even if something be done by guile without force, it is equally covered. 9. The praetor says: "loss"; this term covers all loss, including that effected clandestinely. I do not think, however, that clandestine activity is meant, but loss which is accompanied by violence. It has also been rightly spelled out that if one person alone do something without force, he is not covered by this edict while, if anything be done with a gang, even without force but with intent, that is what concerns this edict. 10. Neither the action for theft nor those of the *lex Aquilia* are made available in this edict, although they sometimes lie also with this

edict; for Julian writes that a robber is a more reprehensible type of thief and that if someone inflict loss with a gang, he can also be sued under the *lex Aquilia*. 11. When the praetor says, "or whose goods are said to have been forcibly taken," we take this to be applicable even if only a single thing be snatched from among the victim's goods. 12. If someone does not himself gather a gang but, being one of the gang, takes something forcibly or inflicts some loss, he is liable to the present action. A question arises whether the edict applies only to loss inflicted or robbery with a gang raised by the defendant or also to such loss or robbery with a gang raised by someone else. The better view is that this latter also is covered, so that all robberies and loss inflicted with a gang raised by another are included so that both the ringleader and the members are liable to this action. 13. In this action, brought within a year of business days, it is the true value of the thing, not the plaintiff's interest in it, which is quadrupled. 14. Again, this action lies in respect of the gang without the requirement of proving which members did the robbing or inflicted the loss. The term "gang" includes slaves, that is, those who are in a condition of servitude, even though they profess to be free or are in good faith serving someone else. 15. I do not think that the plaintiff can proceed by this action against their master in respect of each individual slave; for it is enough that the master should offer the fourfold once. 16. Arising out of this action, there will be noxal surrender of not all the slaves but only of him or them found to have acted wrongfully. 17. This action is generally styled that for goods taken by force. 18. Only he is subject to this action who manifests wrongful intent. Hence, if someone take his own thing by force, he will not be liable to the action for things taken by force, but he will be otherwise punished. And even if he forcibly take back his runaway slave, possessed by another in good faith, he will still not be liable to this action because it is his own thing which he removes. What if it be something pledged to him? It must be said that then he is liable. 19. The action for things taken by force does not lie against an *impubes* who is not capable of the requisite intent; but if one of his slaves or the troop of them be alleged to have done it, he will be liable in either case to the action for things taken by force. 20. If a tax collector make off with my beast, thinking me to be guilty of some tax offense, then, although he be in error, Labeo says that this action does not lie against him; he obviously lacks wrongful intent. But if he should so impound it that it may not graze and so die of starvation, he will be liable to an *actio utilis* under the *lex Aquilia*. 21. If a person impound a beast forcibly driven off, he can be sued by the action for goods taken by force. 22. In this action we do not inquire whether the thing be among the plaintiff's assets or not, but if it be in fact, the action will lie. Hence, whether it be lent, let, or pledged to me, or deposited with me, so that I have an interest in its not being removed, or if I possess it in good faith or have a usufruct or other right in it, such that I have an interest in its not being forcibly taken, it must be said that I have the action under discussion, so that we do not look for ownership but only for the fact that a thing is alleged to have been removed from among my assets, that is, my possessions. 23. And generally, it is to be said that wherever I could have the action for theft for something done by stealth, I will have the present action. Now someone may say: "But we do not have the action for theft in respect of a thing deposited with us." That is just why I added: "if we have an interest in its not being forcibly removed"; for I also have the action for theft, if I have accepted liability for negligence in respect of a thing deposited or if I accept the cost of the deposit other than as a payment for services. 24. It is better said that, even if the action for theft in respect of the thing deposited should lapse, that for goods taken by force remains; for there is no small difference between one who acts stealthily and one who seizes a thing, since the former conceals his wrong,

while the latter flaunts it and also commits a crime. Hence, if someone establish that he has even only a modest interest, he has the action for goods taken by force. 25. If my runaway slave should buy some things to use for his own benefit and they are seized, I can bring the action for things taken by force, since those things are part of my assets. 26. Where goods are so seized, it is possible also to bring the action for theft or for damage wrongfully caused or the *condictio*, and, indeed, individual items may be the object of a *vindicatio*. 27. This action is granted to heirs and other successors; however, being a penal action, it is not given against such heirs and successors. But let us consider whether it should not be granted against them to the extent that they may have been enriched through the wrong. I myself think that the praetor did not promise the action against heirs in respect of what may have come to them, because he took the view that the *condictio* would meet the case.

3 PAUL, *Edict, book 54:* If a man seize goods as a slave and action be brought against him as a freeman, then, even though it was possible to bring proceedings against his former owner for a year after the manumission, proceedings cannot properly be instituted against the freedman himself after that year has passed because with whomever proceedings may be possible, the plaintiff is barred. If the action be brought against the erstwhile owner within the year and then proceedings are taken against the freedman, Labeo says that the plaintiff will be met with the defense of *res judicata*.

4 ULPIAN, *Edict, book 56:* The praetor says: "Where loss be said to have been inflicted deliberately in a tumult, I will, in the year when it first be possible to proceed in respect thereof, give an action for twofold against that man, thereafter the action will be for the value." 1. This edict is issued in respect of the loss that someone causes in a tumult. 2. Labeo says that tumult is named from the general category, disturbance, which itself comes from the Greek ἀπὸ τοῦ θορυβεῖν (creating a disturbance). 3. What number do we require to recognize a tumult? If two get into a brawl, we do not regard that as a tumult because two persons cannot properly be held to create a tumult; but if there were several, ten or fifteen men, it would be held a tumult. What, then, if there were three or four? It would not be a tumult. Labeo very rightly says that there is a great difference between a tumult and a brawl; for a tumult is of a crowd of men who gather and make a commotion, but a brawl is between two. 4. It must be said that under this edict, not only the man who inflicts loss himself in a tumult is liable but also he who deliberately effects it, that loss be caused in such circumstances, whether he be personally present or not; for there can be the wrongful intent in one not there. 5. It must be said also that he is caught by this edict who comes along and is the instigator of the loss effected, if he be part of the tumult when the loss is occasioned and has the requisite intent; for it cannot be denied that what is done in such tumult is done with his intent also. 6. If, by his arrival on the scene, someone provoke or arouse a tumult by some shouting or act, accusing one person or seeking to arouse compassion for himself, assuming that damage be done by his design, he is liable, although he did not come to create the tumult. The fact is that loss is occasioned in the tumult with his intent. For the praetor requires not that a person summon the tumult but that in it, loss be inflicted through his intent. There exists this difference between the present edict and the earlier one; in that one, the praetor speaks of what is deliberately done with a gang or which is seized even without such gang; here he is concerned with that loss which is deliberately inflicted in a tumult, even though the defendant did not himself convene it, but it came together through his shouts or words or appeal for compassion or if someone else convoked it and he himself was part of it. 7. That is why the first edict, by reason of the gravity of the wrong, laid down a fourfold penalty, but the present one, twofold. 8. That again applies, however, only [in the case of both edicts] in the year when action could first be taken; after that, it is for the value. 9. Moreover, the present edict is concerned with loss inflicted and goods lost, not seized while, under the earlier edict, one may proceed in respect of things taken by force. 10. By goods lost we mean cases where something is left to a

person in a defective state, shattered, perhaps, or broken. 11. This is an *actio in factum* for double the value of the thing, meaning its real value; the assessment is as at the time of judgment and, within the year, is always for twofold. 12. The plaintiff must establish that loss was inflicted on him in a tumult, and if it occurred elsewhere, the action will not lie. 13. If, when Titius belabored my slave, a tumult gathered and, in the disturbance, the slave lost something, I could proceed against Titius because the loss was deliberately inflicted in a tumult; that applies where the beating began for the inflicting of loss. If there were any other reason for the thrashing, the action would not lie. 14. If a man himself convoked the tumult so that in its presence he might flog the slave with a view to insult not to causing loss, the edict applies. For it is true that he, who flogs to affront, acts deliberately and he, who gives occasion for the causing of loss, himself inflicts it. 15. The praetor gives the action against the owner in respect of his slave or the household of them. 16. What was said earlier, in connection with the action for things taken by force, may be repeated here.

5 GAIUS, *Provincial Edict, book 21:* It does not avail a robber, in order to evade the penalty, that he restores the thing before action.

6 VENULEIUS, *Stipulations, book 17:* The statute prohibits the usucapion of something seized or forcibly taken before it has returned into its owner's control.

9

FIRE, COLLAPSE OF BUILDINGS, SHIPWRECK, RAFT, AND SHIP TAKEN BY STORM

1 ULPIAN, *Edict, book 56:* The praetor says: "If a man be said to have looted or wrongfully received anything from a fire, a building that has collapsed, a wreck, or a stormed raft or ship or to have inflicted any loss on such things, I will give against him an action for fourfold in the year when proceedings could first be taken on the matter and, after the year, for the value. I will likewise give an action against a slave or household of slaves." 1. If it be indeed in the public interest that nothing should be looted from these disasters, the utility of this edict is patent and its severity most proper. And although there be criminal prosecutions arising from these crimes, the praetor is nonetheless right in propounding civil actions for such offenses. 2. How are we to interpret "from a fire"; is it the actual fire or the place where the fire breaks out? The better interpretation is "on account of a fire," that is, the looting takes place by reason of the confusion and alarm caused by a fire; in the same way, we speak of something lost in war, meaning lost by reason of the war. So also, if anything be pillaged from land adjacent to the scene of the fire, it must be said that the edict is operative; for it is true that the seizure arises out of the fire. 3. In similar manner, the term "collapse of buildings" refers to the time when the destruction occurs and covers seizure by someone not only from the building which comes down but also from adjacent premises. 4. If there be a suspicion of a fire or a collapse which does not actually happen, let us see whether this comes within the scope of the edict. The better view is that it does not, for nothing is seized from either a fire or a collapse. 5. The praetor also says: "if anything from a shipwreck." Here one may ask whether this concerns someone who takes something at the time of the wreck or also one who takes at another time, that is, after the wreck; for things are said to come from a wreck which lie on the shore after the wreck. The better view is that the edict applies to the time

2 GAIUS, *Provincial Edict, book 21:* and place

3 ULPIAN, *Edict, book 56:* where the wreck occurs or has occurred, if someone seize something from it. A person who takes away something lying on the shore after the wreck, however, is in such case that he is a thief rather than subject to this edict, as would be someone taking what falls from a vehicle. Nor is someone regarded as looting who picks up something lying on the shore. 1. Then the praetor says: "a raft or ship taken by storm." He is regarded as storming who seizes something in the actual battle or fight with the raft or ship, whether he be himself an attacker or seize the thing from the attacking brigands. 2. Labeo writes that it would be right that this edict should apply where something is seized from a town or country house which has been stormed; for both at sea and in a house, we are disturbed and can be infested by brigands. 3. But not only the actual taker but also one who receives goods seized in such circumstances is liable; for receivers are no less offenders than the aggressor. There is added, though, "with wrongful intent"; for not every receiver is forthwith an offender but one who receives with wrongful intent. For what if he receive in ignorance of the thing's provenance or if he receive the thing to safeguard it and make it secure for the person who has lost it? In neither case should he be liable. 4. Now this action lies not only against one who takes by force but also against one who removes a thing or takes it away or receives it or inflicts damage on it. 5. That there is a distinction between seizure and taking away is obvious; for a thing can be taken away even without force; but it cannot be seized except by force. 6. One who seizes anything from a wrecked ship is liable under this edict. The Greek term for "wrecked" is '*εβρασθη*. 7. What the praetor says of the infliction of damage is applicable only if the damage be deliberate. For if wrongful intent be absent, the edict has no place. How then does one proceed over what Labeo writes that if, when a fire arose therein, I pull down my neighbor's house in self-defense, an action will be granted both against me personally and in the name of my family? Since I do this to preserve my own premises, I am lacking in evil intent. I think, therefore, that what Labeo writes is not correct. But would it be possible to proceed under the *lex Aquilia* in such circumstances? Again, I think not; for a person does not wrongfully so act who seeks to preserve himself when he had no other cause of action; and so writes Celsus. 8. In the reign of Claudius, a *senatus consultum* was passed whereby, if someone should remove the nails from a wreck or, indeed, but one of them, he is liable in respect of all. Again, by another *senatus consultum*, it is provided that those, by whose malice or design, knowledge of a wreck is forcibly suppressed so that no relief may reach the ship or those in peril thereon, shall be subject to the penalties ordained in the *lex Cornelia de sicariis*; but those who seize anything through the miserable plight of the shipwrecked and are designedly enriched will have to give also to the imperial treasury as much as the amount for which an action under the praetor's edict will be given against them.

4 PAUL, *Edict, book 54:* Pedius holds that he also can be said to loot from a wreck who, while the wreck is happening, seizes anything in the attendant commotion. 1. On the subject of those who seize booty from a wreck, the deified Antoninus, in a rescript, provided thus: "What you have written to me concerning the wreck of a ship or raft has this relevance, that is to say, that you wish to know what penalty I think should be imposed upon those who are proved to have looted in such case. This, in my opinion, is easily settled. Now it is of the highest significance whether they take what would else

be lost or whether they flagrantly appropriate what could be saved. If it be the more serious latter, the booty appears to be forcibly acquired, and in the case of free offenders, you will have them beaten with clubs and relegate them for three years, or if they be of the lower orders, condemn them to public works for the same period; slaves you will flog with the lash and condemn to the mines. If the goods be of small value, you may release freemen after a cudgeling and slaves after a flogging." Generally, in such cases as in others, careful assessment is to be made in the light of the status of the offender and of the gravity of the offense, so that no sentence may be passed which is more severe or more lenient than the case requires. 2. These actions lie to heirs; they are granted against heirs only to the extent that any benefit has come to them from the wrong.

5 GAIUS, *Provincial Edict, book 21:* If someone remove or seize a thing saved from a wreck, fire, or collapse of a building and put it in another place, he will be liable to the action for theft or that for things taken by force, even though unaware that it comes from a wreck, fire, or collapse of building. Many are of the opinion that where someone appropriates from a wreck something which is lying washed up by the waves, the same applies. This is true if some time has elapsed since the wreck; but if what happens occurs at the very time of the wreck, it is irrelevant whether the seizure be made from the sea itself, the wreck or the shore. We must adopt the same interpretation in respect of what is seized from a raft or ship which has been stormed.

6 CALLISTRATUS, *Monitory Edict, book 1:* A ship is stormed when it is despoiled, sunk, broken up, or holed or its ropes are cut through or its sails are slashed or its anchors seized up from the sea.

7 CALLISTRATUS, *Questions, book 2:* A wide variety of provisions has been made so that nothing should be snatched from wrecks or that no third party interfere in the collecting of them. For the deified Hadrian also by edict ordained that those holding property near the shore should know that if a ship be dashed against or break up within the boundaries of their lands, they are not to despoil the wreck, else governors will grant actions against them to those complaining that their property has been seized, so that if anything be proved to have been taken from the wreck, it may be recovered from the landholder. But in the case of those proved to have looted, the governor is to inflict a grave penalty as on brigands. To facilitate proof in such cases, the emperor allows those who complain that they have suffered in such wise to approach the prefect and then to state their case and ask that the defendants, in proportion to their fault, either be bound or provide verbal guarantors and so be remitted to the governor. It is further provided that the owner of the land where this is said to have happened shall give security that he will be present for the hearing. The senate resolves that in the collection of what has been wrecked, there shall participate no soldier, private individual, or freedman or slave of the emperor.

8 NERATIUS, *Replies, book 2:* If your raft be brought onto my land by the force of the river, you will not be able to exert control over it unless you first give me a *cautio* in respect of any prior damage to me.

9 GAIUS, *XII Tables, book 4:* A person who burns down a building or a pile of corn set beside a dwellinghouse is directed to be bound, flogged, and put to death by fire, if, that is, his act was deliberate and conscious. If, however, he did it by chance, that is, through negligence, he is to make good the wrong, or if his means be inadequate, be more lightly punished. The expression "building" covers every form of edifice.

10 ULPIAN, *Opinions, book 1:* The duteous watchfulness of the provincial governor

shall ensure that night fishermen do not, by display of light, deceive those at sea as though guiding them to some port, thereby leading the ship and its complement into danger and preparing for themselves a damnable prize.

11 MARCIAN, *Institutes, book 14:* If a fire be caused by chance, it merits indulgence unless the carelessness be so great as to be rank and nearer to deliberate intent.

12 ULPIAN, *Duties of Proconsul, book 8:* It is established that it is lawful for anyone to collect with impunity his wrecked property; so ruled the Emperor Antoninus and his deified father in a rescript. 1. Those who deliberately start a fire in a city, if they be of lower rank, are usually thrown to the beasts; but if they be of some standing, they are subjected to capital punishment or certainly deported to an island.

10

CONTUMELIES AND DEFAMATORY WRITINGS

1 ULPIAN, *Edict, book 56:* Wrong is so called from that which happens not rightly; for everything which does not come about rightly is said to occur wrongfully. This in general. But, specifically, "wrong" is the designation for contumely. Sometimes again, by the term "wrong" there is indicated damage occasioned by fault, as we say in respect of the *lex Aquilia*; then, too, we sometimes call unfairness wrong; for when someone delivers judgment unfairly or unjustly, it is called wrong; for it lacks lawfulness and justice, as not being rightful; but contumely derives from despising or deriding. 1. Labeo says that contumely can be perpetrated by act or by words: by act, when an assault is made; by words, there is insult whenever there is no physical attack. 2. Every contumely is inflicted on the person or relates to one's dignity or involves disgrace: It is to the person when someone is struck; it pertains to dignity when a lady's companion is led astray; and to disgrace when an attempt is made upon a person's chastity. 3. Again, a contumely can be effected against someone personally or through others: personally, when a head of household or matron is directly affronted; through others, when it happens by consequence, as when the affront is to one's children or slaves, one's wife or daughter-in-law; for a contumely affects us which is suffered by those who are subject to our power or are the objects of our affection. 4. And if perchance the corpse should be contumeliously treated of a deceased to whom we are heirs or recipients of his estate, we have the action for insult in our own right; for it affects our own reputation, if any insult be directed at the corpse. The same applies if the good repute of one to whom we are heirs be damaged. 5. So far does an affront to our children affect our own honor that if someone should sell another's son, even with his consent, the father will indeed have the action for insult in his own right; but there will be no action on behalf of the son, because there is no affront where the victim consents. 6. Now whenever there be any affront at the testator's funeral or to his corpse, if it occur after the inheritance has been accepted, it must be said that in a sense, the insult is to the heir (for it is always the heir's obligation to vindicate the reputation of the deceased); but if it be before acceptance, the insult is rather to the inheritance itself and it is thus through the inheritance that the heir will acquire the action. Then Julian writes that if a testator's corpse be detained by someone before acceptance of the inheritance, there is no doubt that the action vests in the inheritance. He also thinks that the same is true if, even before the inheri-

tance has been accepted, an affront be perpetrated on a slave who is part of the estate; for the heir will acquire the action through the inheritance. 7. Labeo writes that if, before acceptance of the inheritance, someone thrash a slave, part of the inheritance, who is manumitted by the will, the heir can bring the action for insult; but if the thrashing takes place after the inheritance has been accepted, then, whether or not he knows that he is free, the victim himself can bring the action. 8. Whether a wrongdoer knows or does not know that someone is my son or my wife, Neratius writes that I have the action in my own name. 9. Neratius again says that sometimes the action for insult will lie to three people in respect of the one affront, and the right of action of none will be consumed by reason of proceedings by one. Suppose that my wife who is a daughter-in-power be affronted; the action for insult forthwith becomes available to me, to her, and to her father.

2 PAUL, *Edict, book 50:* But if a husband suffer affront, the wife does not have an action; for it is right that wives should be defended by their husbands but not husbands by their wives.

3 ULPIAN, *Edict, book 56:* We are told that those who can suffer can equally be guilty of contumely. 1. Of course, there are some who cannot be guilty, such as the lunatic and the *impubes* not capable of wrongful intent; they can suffer affront but not be guilty of perpetrating it. For since affront consists in the will of the culprit, it follows that these classes, even if they do strike people or shout abuse, will not be regarded as having committed an affront. 2. Thus, someone can suffer an insult, even though unaware, but no one can perpetrate one without knowing what he is doing, even though he does not know to whom he is doing it. 3. Hence, if someone strike another in jest or during a contest, he will not be liable to the action for insult. 4. If someone beat a freeman, thinking that he is his slave, the position is that he is not liable to the action for insult.

4 PAUL, *Edict, book 50:* If, when I wish to punch my slave, I involuntarily hit you standing next to him, I will not be liable to the action for insult.

5 ULPIAN, *Edict, book 56:* The *lex Cornelia* on contumelies applies to one who wishes to bring the action for insult on the ground that he declares himself to have been beaten or thrashed or his house to have been entered by force. The statute provides that the action shall not be heard by one who is the son-in-law, father-in-law, stepfather, stepson, or cousin of the plaintiff or one closely related to them by blood or marriage or by one who is the patron of any of them or of their parent. And so the *lex Cornelia* gives an action on three grounds: that a person was beaten or was thrashed or that his house was entered by force. It thus appears that every physical affront is covered by the *lex Cornelia.* 1. Between beating and thrashing there is, as Ofilius writes, this difference: to thrash is to hit with the infliction of pain, to beat is without it. 2. House we must interpret not in terms of ownership but as one's place of residence. Hence, whether a person live in a house which he owns or one he rents or has free or by hospitality, the statute applies. 3. What if he live in a country house or park? The same is true. 4. And if the owner has let a farm which is invaded, it is the tenant, not the owner, who can take proceedings. 5. But if entry be made on a farm belonging to someone else, which is being cultivated for the owner, Labeo says that that owner cannot proceed under the *lex Cornelia;* for he cannot have his place of residence everywhere, that is, in each of his country houses. For my own part, I think that the statute applies to any abode in which a head of household may live, although

he does not have his place of residence there. Let us take someone at Rome as an example for the purpose of study; a man may not have his residence at Rome, but if his house at Rome be entered by force, it must be said that the *lex Cornelia* is applicable. But it does not apply to temporary lodgings or brothels; but it concerns those who are not merely transient inhabitants, although the house is not their normal residence. 6. It has been asked whether, when his son-in-power has suffered contumely, the head of household can proceed under the *lex Cornelia*; it has been settled that he cannot and on that all agree. The father will have the praetorian action for insult; but it is the son who will have that under the *lex Cornelia*. 7. Under the *lex Cornelia*, the son-in-power can proceed on every ground, and he is not obliged to give a *cautio* that his father will ratify the proceedings; for Julian writes that a son-in-power, bringing proceedings for affront, cannot be compelled to give such undertaking. 8. Under this statute, it is permissible for the plaintiff to offer the defendant the opportunity of swearing an oath that he was not guilty of the contumely. Sabinus says [in his book *Duties of Assessors*] that praetors follow the example of the statute; and so things stand. 9. It is provided that if anyone write, compose, or publish a writing pertaining to the disgrace or disrepute of another or deliberately bring it about that any of these things be done, whether the publication be in someone else's name or anonymous, then action may be brought over the issue, and if the culprit be condemned, he shall become infamous under the statute. 10. The same penalty is extended by *senatus consultum* to anyone who produces epigrams or an anonymous writing defaming another, as also to one concerned to traffic in such things. 11. And for the person who exposes such offenses, whether he be free or a slave, there is provided a reward according to the wealth of the accused, to be assessed by the judge and, in the case of a slave, liberty may also follow. For it may be that public good emerges from the exposure.

6 PAUL, *Edict, book 55:* This *senatus consultum* is needed when the name is not given of the victim of the defamation; for then, since establishment of the truth is difficult, the senate was of opinion that the matter should be clarified in a public tribunal. If, on the other hand, the name is given, the victim can also proceed by the ordinary action for insult; for he is not to be barred from the private proceedings, although this would preclude public process, because the issue is a private one. Of course, if public proceedings have already taken place, the private action is to be denied; the converse also holds good.

7 ULPIAN, *Edict, book 57:* In his edict, the praetor said: "He who brings the action for insult must particularize what has been done that is affronting"; for one who brings an action which entails infamy should not be vague, at the peril of another's reputation, but should specify and set out in detail the affront that he claims to have suffered. 1. If a slave be said to have been contumeliously killed, why is it that the praetor should not allow the matter to be resolved by a private action to the prejudice of the *lex Cornelia*? The same issue would arise if the plaintiff wish to bring an action "because you administered poison to kill a slave." And so the praetor acts more correctly if he does not allow such an action. Now we normally say that in those cases where public proceedings are possible, we should not be prevented from bringing instead a private action. This is true, but in those cases where the issue is not one which chiefly has public consequences. What, then, do we say of the *lex Aquilia*? Now that action is not chiefly concerned with whether the slave has been killed; in the Aquilian action, the main issue is the loss which the owner has suffered; but in the Cornelian action it is

that the death as such or the poisoning be punished, not that loss be made good. What, then, if someone wish to bring the private action for insult because his head has been struck by a sword? Labeo says that there is no objection because, he says, there is nothing here which has public overtones. This is not true; for who can doubt that it should be said that the assailant can be proceeded against under the *lex Cornelia*? 2. It is further relevant that the affront which someone suffers be specified, so that we may know from the gravity of the offense whether the action for insult should be granted to a freedman against his patron. For it must be remembered that the action for insult is not always given to a freedman against his patron but only on occasion, when the affront which he has suffered be aggravated, as if he be treated as a slave. We allow a patron a restricted right of punishment of his freedman, and the praetor will not listen to the latter complaining of contumely unless there be an element of aggravation; for the praetor does not have to tolerate the slave, now a freedman, complaining against his master that the latter abused him verbally or moderately chastised or corrected him. But if the chastisement be with the lash or rods or if the patron inflict a grievous wound, it is eminently right that the praetor should give succor to the freedman. 3. Equally, if a child not in power wish to proceed against his father, the action for insult is not lightly granted, but only if aggravation suggest it. To those children who are in power, the action is never available, even if there be aggravation. 4. When the praetor says, "let him specify what was done by way of affront," how should that be understood? Labeo says that a person specifies who gives the name of the affront, without any alternatives such as this or that, but the actual affront which he has suffered. 5. Suppose that you inflict several contumelies upon me; for example, a disturbance and a crowd having been created, you enter someone's house, and thereby I suffer, and at the same time, I am subjected to abuse and am thrashed; the question arises whether I can proceed against you separately in respect of each individual affront. Marcellus, following the view of Neratius, holds that a plaintiff must join together in one action affronts which were received at the same time. 6. Our emperor has ruled in a rescript that today one may take civil proceedings in respect of every affront including those which are aggravated. 7. We regard as aggravated an affront which is more serious and more contumelious. 8. Labeo says that an affront may be aggravated by virtue of the person, the time, and its very nature. It is aggravated by virtue of the person, when inflicted on, say, a magistrate, one's parent, or patron; by reason of time, if inflicted at the games or in full view; for Labeo says that it is of great importance whether the affront be perpetrated in the view of the people or in private, the former being aggravated. Labeo says that it is aggravated by its very nature if, say, a wound be inflicted or someone receive a blow in the face.

8 PAUL, *Edict, book 55:* It is the magnitude of the wound which constitutes the aggravation, and sometimes its position, as when one is struck in the eye.

9 ULPIAN, *Edict, book 57:* But it is a matter of discussion, in talking of an affront being aggravated by its very nature, whether that applies only when it is inflicted upon the person or also when it is not a physical assault; for instance, if garments be

torn, an attendant abducted, or abuse shouted. Pomponius says that an affront can be said to be aggravated, even without striking, the person of the victim creating the aggravation. 1. Again, if one person strike or wound another, even though only slightly, in the theater or a public place, he is guilty of an aggravated affront. 2. It matters little whether the victim be a head of household or a son-in-power; an affront to the latter can also be held aggravated. 3. Should a slave commit an aggravated affront, then, if his owner be present, proceedings can be taken against the owner; but if the owner be absent, the slave is to be handed over to the governor who will have him scourged. 4. If a person attempt to debauch another, whether male or female, freeborn or made free, he will be liable for affront. So also if an attempt be made upon the chastity of a slave.

10 PAUL, *Edict, book 55:* There is said to be an attempt upon chastity when it is sought to make the virtuous wanton.

11 ULPIAN, *Edict, book 57:* Not only he is liable for affront who actually inflicts it, that is, who inflicts the blow, but also he who deliberately brings it about or takes steps to ensure that a cheek be struck by a fist. 1. The action for insult is one based on what is good and equitable and will not lie in the event of dissimulation by the victim. For if someone ignore the affront, that is, as soon as he suffers it, he does not direct his mind to it, he cannot, on second thoughts, revive the affront which he let pass. In consequence, the equitable nature of the action removes all fear of its being granted whenever a plaintiff does not come forward in circumstances of equity. Hence, if there has been any agreement of the parties over the affront or if they have made a *transactio* or if the alleged insulter has sworn that he was not guilty, the action for insult will not lie. 2. One may bring the action for insult oneself or through another person, for instance, a procurator or tutor or others who are accustomed to act on behalf of someone else. 3. If someone be affronted on my mandate, the majority say that both I and the person who accepted my mandate are liable to the action for insult. 4. Proculus rightly says that if I hire you to perpetrate an affront, proceedings can be taken against each of us; for it was done by my design. 5. He says the same even if it be my son to whom I gave my mandate for the wrong. 6. And Atilicinus says that equally, if I persuade someone, who else would be unwilling, to obey me in perpetrating an affront, I can be sued in the action for insult. 7. Although the action for insult is not given to a freedman against his patron, the husband of a freedwoman can have an action in respect of her against her patron; for when a wife suffers insult, her husband is regarded as bringing an action for insult in his own right. This is what Marcellus says. For my own part, I have made a note on him that I do not think that this holds good for every affront; for why should the patron be denied reasonable chastisement or, provided it is not lewd, berating even of a married woman? But if she be married to a fellow freedman of the same patron, then we must say that the action for insult is completely unavailable to the husband against the patron. And many share this view. From all this it will be apparent that our freedmen are unable to avenge against us, with the action for insult, not only the affronts that they personally suffer but also those endured by persons in whose not being insulted they have an interest. 8. Obviously, where the son or wife of a freedman should wish to take proceedings, since the action is not allowed to the father or husband, it should not be denied to them for they are suing in their own name. 9. There can be no doubt that the action is available to one alleged to be a slave but who maintains his free status against the man who declares himself his master. This is true whether the prospective plaintiff is being claimed from liberty into slavery or himself is asserting his freedom out of slavery. For here we make no distinction.

12 GAIUS, *Provincial Edict, book 22:* If a man claim as his slave someone whom he knows to be free and he does not do this by reason of an eviction in order to keep his claim for redress for himself, he is liable to the action for insult.

13 ULPIAN, *Edict, book 57:* The action for insult is granted neither to nor against heirs.

The same applies if it be my slave who is the victim; for here again the action will not be granted to my heir. But once issue has been joined, the action can be continued by successors. 1. A person who does something under the public law will not be treated as having done it with a view to affront; for there is no wrong in the administration of the law. 2. If someone be led away for failing to comply with a decree of the praetor, the case is not such that he can bring the action for insult by reason of the praetorian order. 3. If, to annoy me, someone interrupt me in an insulting manner when speaking before some court, I can bring the action for insult. 4. If, in a matter of decreeing honors for someone, a person be unwilling that they should be decreed, for example, a statue or the like, can proceedings for insult be brought against him? Labeo says that he is not liable, even though there be contumely in his conduct; he says that there is a great distinction between whether a thing be done out of contumely and whether a person will not tolerate the honoring of another. 5. Labeo further says that if, when a subsidiary appointment fell to one person but a *duumvir* assigned it to another, the latter cannot have the action for insult in respect of the burden imposed; it is one thing to impose a burden, another to perpetrate an affront. The same should be accepted also in respect of other *munera* and offices wrongly imposed. Hence, also if a judge pronounce his decision wrongfully, the same rule is to be adopted. 6. Those things which are done within the power of a magistrate are not relevant to the action for insult. 7. If someone prevent me from fishing in the sea or from lowering my net (which in Greek is σαγήνη), can I have the action for insult against him? There are those who think that I can. And Pomponius and the majority are of opinion that the complainant's case is similar to that of one who is not allowed to use the public baths or to sit in a theater seat or to conduct business, sit or converse in some other such place, or to use his own property; for in these cases too, an action for insult is apposite. The older jurists, however, gave a tenant, assuming that he was a state tenant, the interdict since there is a prohibition on the use of force to prevent a tenant enjoying what he has hired. Now what are we to say if I forbid someone to fish in front of my house on my approaches? Am I or am I not to be liable to the action for insult? In this context, it has been frequently stated in rescripts that the sea and its shores, as also the air, being common to all, no one can be prohibited from fishing; no more can a person be from fowling, unless it be a case where he can be barred from entering another's land. However, the position has been adopted, although with no legal justification, that one can be banned from fishing before my house or my approaches; hence, if someone be so barred, there can, in those circumstances, be an action for insult. But I can prohibit anyone from fishing in a lake which I own.

14 PAUL, *Plautius, book 13:* Of course, if someone has a particular right in the sea, he will have the interdict for possession of land, if prevented from exercising his right, because this matter pertains to private not to public law in that one is concerned with enjoyment of a right deriving from a private, not a public, origin. For interdicts pertain to private, not to public, matters.

15 ULPIAN, *Edict, book 77:* The question is also raised by Labeo whether, if a person derange another's mind by a drug or some other means, the action for insult lies against him; and he says that it does. 1. If someone be not in fact struck but hands are raised against him and he is frequently afraid of a beating, though not in fact struck, the wrongdoer will be liable to an *actio utilis* for insult. 2. The praetor says: "One who is said to have loudly shouted at someone contrary to sound morals or one

through whose efforts such shouting is effected contrary to sound morals, against him I will give an action." 3. Labeo says that shouting is an affront. 4. The term derives from a mob or gathering, that is, a combination of voices. For when several voices are directed at one person, that is called a shouting, as it were a gathering of voices. 5. But the praetor's qualification "contrary to sound morals" shows that he does not condemn all loud calling after a person, but only that which offends against sound morals and is directed to the disgrace and unpopularity of an individual. 6. Labeo says that "contrary to sound morals" is to be taken as referring not to those of the offender but to those of this city. 7. Labeo also says that there can be such a shouting against one who is absent no less than one who is present. If, say, a person comes to your house while you are away, there is said to be such a shouting, and the same applies if he should go to an inn or tavern. 8. Not only the person who actually gives tongue is guilty of such shouting but also he who incites others to or causes the clamor. 9. "Someone" is inserted in the edict not without purpose; for if the shouting be against a nonspecific person, there is no legal consequence. 10. If a man organize a shouting against someone but it does not take place, he will not be liable. 11. From all this it will be apparent that not all vituperation constitutes a shouting. 12. Only that which is effected loudly in a crowd, whether by one or several, constitutes a shouting. What is not said loudly and in a crowd is not properly called a shouting, but abuse with a view to humiliation. 13. If some astrologer or one offering some other unlawful foretelling, on being consulted, should say that someone is a thief when he is not, there will be no action for insult against him, but he is liable under imperial enactments. 14. An action for insult arising out of such shouting is given neither to nor against heirs. 15. If someone accost maidens, even those in slave's garb, his offense is regarded as venial, even more so if the women be in prostitute's dress and not that of a matron. Still if the woman be not in the dress of a matron and someone accost her or abduct her attendant, he will be liable to the action for insult. 16. By "attendant," we mean one who escorts and follows, whether (as Labeo says) free or slave, male or female; and so Labeo defines an attendant as "one whose role is to follow someone for the purpose of companionship, in public or in private, who is abducted." Slaves who accompany children to school are included among attendants. 17. As Labeo says, the person regarded as abducting is not he who begins to lead the attendant astray but he who achieves the result that the attendant is not with the mistress. 18. Not only he who leads away by force is regarded as abducting but also one who persuades an attendant to desert the mistress. 19. The edict applies not only to one who abducts an attendant but also to one who accosts or follows one of them. 20. To accost is with smooth words to make an attempt upon another's virtue; this is not a shouting but an attempt contrary to sound morals. 21. One who uses base language does not make an attempt upon virtue, but he is liable to the action for insult. 22. It is one thing to

accost, another to follow. A person accosts who verbally solicits chastity; he follows who silently walks close behind; and assiduous proximity virtually reveals something disreputable. 23. It must, though, be remembered that not everyone who follows or accosts is caught by this edict (nor does one who so acts, with a view to play together or to perform some proper office, fall forthwith within the edict) but only he who does so contrary to sound morals. 24. I think that a fiancé also should be able to bring the action for insult; for there is an outrage to him in any affront that his betrothed may suffer. 25. The praetor says: "In order that nothing be done that is shaming, if anyone act to the contrary, I will deal with it according to the nature of the issue." 26. Labeo says that this particular edict is superfluous since we can proceed under the general edict on insults. But it appeared to Labeo himself (and he says so) that the praetor wished to speak specifically of this matter; for things which happen and merit redress may appear to be ignored unless they are specially mentioned. 27. The praetor bans generally anything which would be to another's disrepute. And so whatever one do or say to bring another into disrepute gives rise to the action for insult. Here are instances of conduct to another's disrepute: to lower another's reputation, one wears mourning or filthy garments or lets one's beard grow or lets one's hair down or writes a lampoon or issues or sings something detrimental to another's honor. 28. When the praetor says, "if someone act to the contrary, I will deal with it according to the nature of the issue," this means that the praetor has the widest discretion so that if there be anything that influences him in the person of the plaintiff or of the defendant or in the nature of what was done or in the scale of the affront, he will not hear the plaintiff. 29. Papinian says that if, after a complaint has been lodged with the emperor or another magistrate, a person abuses the character of another, proceedings for insult will follow. 30. He also says that one who sells the award to be made in a court decision, as though giving the money, and who is cudgeled on that account by the governor is regarded as condemned for insult; he is treated as having committed an affront to the person in whose decision he was trafficking. 31. If someone wrongfully appropriates another's assets or only one of them, he is liable to the action for insult. 32. Similarly, if someone announce that he is selling a pledge to denigrate me, as though he had received it from me, Servius says that I can bring the action for insult. 33. If someone summon a nondebtor as if he were a debtor, by way of insult, he is liable to the action for insult. 34. The praetor says: "Where a man shall be said to have thrashed another's slave or to have submitted him to torture, contrary to sound morals, without the owner's consent, I will give an action. Equally, if it be said that something else be done, I will, having heard the circumstances, give an action." 35. If someone so inflict an outrage upon a slave that it be done to his master, in my view the master can bring the action for insult in his own right; but if the beating was not directed to the master, the outrage perpetrated upon the slave as such should not be left unavenged by the praetor, especially if it occurred through a thrashing or through torture; for it is obvious that the slave himself feels such things. 36. If a man thrash a slave that he owns in common, he will not be liable to this action since he did what he did by right of ownership. 37. No more could a fructuary proceed against the owner or the owner against the fructuary in such circumstances. 38. The words "contrary to sound morals" are inserted because not everyone who thrashes, but he who thrashes contrary to sound morals, is liable. One who does so by way of correction or reform is not liable. 39. Hence, Labeo raises the question: If a municipal

magistrate whips my slave, can I have the action against him as having done so contrary to sound morals? And he says that the judge must investigate what my slave was doing for him to thrash him; if he beat him for an audacious attempt upon his office and insignia, the magistrate must be absolved. 40. A person who beats someone with his fists is also loosely said "to thrash." 41. By torture we mean the infliction of anguish and agony on the body to elicit the truth. Mere interrogation or mild intimidation does not come within this edict. The word will also include what are called "bad quarters." It is when an investigation is conducted with force and bodily torment that there is said to be torture. 42. But if, on the master's instructions, someone puts a slave to the question but exceeds the limit, Labeo says that he is liable to the action. 43. The praetor says: "If anything else be done, I will, having looked into the matter, grant an action." If, indeed, a slave be thrashed or put to the question with torture, an action will be granted against the wrongdoer without more; but if the slave suffer some other affront, an action will not issue without the praetor's looking into the matter. 44. Thus, the praetor does not promise an action for every affront in respect of a slave; if the slave be lightly struck or mildly abused, the praetor will not give an action; but if he be put to shame by some act or lampoon, I think that the praetor's investigation into the matter should take into account the standing of the slave; for it is highly relevant what sort of slave he is, whether he be honest, regular, and responsible, a steward or only a common slave, a drudge or whatever. And what if he be in fetters, branded, and of the deepest notoriety? The praetor, therefore, will take into account both the alleged affront and the person of the slave said to have suffered it and will grant or refuse the action accordingly. 45. An affront to a slave sometimes affects the master also, sometimes not; for if the slave is posing as a freeman or if the person who beats him thinks that he belongs to someone else and would not have done it if he knew that the slave was mine, Mela writes that the striker cannot be sued as having affronted me. 46. If, when his slave has been thrashed, a master bring the action for insult and subsequently sues for wrongful damage, Labeo says that the two issues are not the same for the second action relates to damage caused by fault, the former action to outrage. 47. If I have a usufruct in a slave and you own him and the slave is thrashed or put to the question, you as owner rather than I will have the action for insult. 48. Again, if someone beat a freeman who is in good faith acting as my slave, a distinction must be made; if he was beaten to affront me, I will have the action for insult. The same applies in respect of someone else's slave serving me in good faith, so that we allow the action for insult whenever what is done is done to affront me. Indeed, we do give a master the action for insult in the name of the slave. But if the slave is beaten to get at me, I also have my own action. And the same distinction can be taken in respect of the fructuary. 49. It is more than obvious that if I beat a slave with several owners, each of them has the action for insult.

16 PAUL, *Edict, book 45:* But Pedius says that it would be unfair for condemnation to be for more than the share of each respective owner; and so it will be for the judge to assess the shares.

17 ULPIAN, *Edict, book 57:* But if I did it with the permission of one owner, thinking the slave to belong to him alone, none would have the action for insult. Clearly, if I know that there are several owners, no action will be available to the one who gives me permission, but the others can sue me. 1. If a slave be put to the question by the direction of a tutor, procurator, or curator, it must be said that no action for insult will

lie. 2. My slave is scourged by our magistrate by reason of your design or your complaint to the magistrate. Mela is of opinion that I should be given the action for insult against you for whatever on that account seems right and proper, and if the slave should die, Labeo says that as owner, I can sue for the loss that I have incurred through the affront. This is also the view of Trebatius. 3. Some affronts which, perpetrated by freemen, are regarded as slight (of no consequence) are serious if perpetrated by slaves. For the outrage is enhanced by the station of the person responsible. 4. When a slave effects an affront, he obviously commits a delict; and just as in the case of other delicts, so also a noxal action for insult will issue; but it is in the master's discretion whether he will submit the slave to a thrashing to mollify the victim of the affront; the master will not be obliged to present him for a thrashing but he will have the option of allowing him to be thrashed or, if that would not satisfy the affronted person, of giving him in noxal surrender or of accepting an award of damages in legal proceedings. 5. The praetor says: "by the judge's ruling," that is, by the ruling of a good man in stipulating the extent of the thrashing. 6. If, before the judge, a master presents his slave for thrashing so that the victim may receive satisfaction thereby, and the punishment be inflicted at someone's discretion, and the victim-plaintiff later carries on with his action for insult, he is not to be heard; for one who accepts satisfaction waives his affront. For if one voluntarily waive the affront, it must unquestionably be said that the action for insult no longer lies, any more than it would if the lapse of time extinguished the affront. 7. If, at the instigation of his master, a slave should perpetrate an affront, the master can certainly be sued in his own respect. But if the case be put that the slave has been manumitted, Labeo was of opinion that the action should be given against the freedman himself, because the wrong attaches to the actual wrongdoer, and a slave is not obliged to obey his master in everything; equally, if the slave should kill someone at his master's behest, we proceed against him himself under the *lex Cornelia*. 8. Of course, if the slave do something to protect his master, it would seem that that should stand to his credit, and in the case, a defense could be set up against the plaintiff. 9. If a slave in whom I have a usufruct affront me, I can have a noxal action for insult against his owner for I should not be in worse case because I have a usufruct in him than if I did not. The case is different if he be a slave that I own in common; in such an event, we do not give the co-owner an action because he is himself liable to the action for insult. 10. The praetor says: "If an affront be alleged against one in the power of another and neither the person in whose power he is be present nor any procurator who could take proceedings in the matter, having investigated the matter, I will grant an action to the person alleged actually to have suffered the affront." 11. Where a son-in-power is affronted and his father is present but, through lunacy or some other mental defect, cannot take proceedings, I think that the action for insult should be given to the son; for such a father is like one who is not present. 12. Of course, if the father be present but does not wish to sue, whether because he is at difference with his son or waives or indeed forgives the affront, the better view is that the son should not be granted the action; for even if he be absent, the son is given the action on the probability that were he present, the father would take proceedings. 13. But we believe that the action for insult should sometimes be granted to the son even though the father waive the affront, for instance, if the father be vile and abject, while the son is a decent man; for a grossly debased father should not evaluate the insult to his son by the standards of his own turpitude. Let us put the case of a father in place of whom a curator has, lawfully and properly, been appointed by the praetor. 14. But if a father, after joinder of issue, disappears or a vile father fails to prosecute the proceedings, it must be said that after investigation of the matter, the action should be transferred to the son. The same applies if it be posited that the son has been emancipated. 15. The praetor gives precedence to the father's procurator over those who are actually insulted. But if the procurator neglects the proceedings or is in collusion with or does not provide a substitute for himself against those guilty of the affront, the action for insult lies to the actual victim of the wrong. 16. By "procurator," we understand not only one specifically charged with bringing the action for insult but also one who has general administration of the head of household's affairs. 17. When the praetor says that after investigation of the matter, the action will be granted to the actual victim of the wrong, this is to be interpreted as meaning that in the

investigation, there will be considered such issues as how long the father has been absent and when he will return and whether the person who wishes to proceed for insult is more than indolent and so useless as to be inadequate for the conduct of the matter and therefore for the prosecution of the action. 18. When the praetor then says, "one who suffers an affront," this must be taken in the sense that the action sometimes lies to his actual father. Suppose a grandson to have been insulted and his father is about but his grandfather is away; Julian writes that the action for insult should be given to the father rather than to the grandson; for, he says, it is for the father, even while the grandfather is alive, to protect his own son in all things. 19. Julian again writes that not only can a son bring the action himself but he can give a procurator in his stead; for otherwise, he says, if we do not allow him to appoint a procurator, it could be that he being ill and there being no one to prosecute the proceedings, the action would be impeded. 20. Julian also says that if a grandson suffer affront and there be no one to take proceedings in the grandfather's name, the father should be allowed to sue and to substitute a procurator. For everyone who can bring an action in his own right is given the power to put forward a procurator instead; and, says Julian, the son-in-power is deemed to sue in his own right when, the grandfather being absent, the praetor allows him to take proceedings. 21. If a son-in-power bring the action for insult, it is not also available to his head of household. 22. Julian also says that the action for insult can be given to a son-in-power whenever there is no one to proceed as head of household and, in such a case, he is treated as though he were such head. Hence, whether he be emancipated, appointed part-heir to his father's estate, disinherited, or abstain from taking his father's property, prosecution of the proceedings is allowed him. For it would be quite absurd that if the praetor allow him to bring the action while still in paternal power, he should be deprived of the avenging of his wrong by himself becoming a head of household and that the action be transferred to the father who cut him out of his will in whole or part or, which would be even more unworthy, that the action should go to his father's heirs to whom it is beyond doubt that the affront to the son-in-power has no relevance.

18 PAUL, *Edict, book 55:* It would not be right and proper that a person should be condemned for putting to shame a wrongdoer; for the sins of those who do wrong should be noted and noised abroad. 1. If a slave affront another slave, the proceedings should be as if the master had been the victim. 2. If a daughter-in-power be affronted, both her husband and her father have the action for insult. Pomponius correctly thinks that the defendant should be condemned to the father for the amount that he would be condemned if she were a widow, the father being her head of household, and to the husband as if she were independent; for everyone's affront has its own basis of assessment. Thus, if a married woman be independent, she is no less able to bring her own action for insult because her husband has his. 3. If an affront be perpetrated against me by someone to whom I am unknown or who thinks me to be Lucius Titius when I am in fact Gaius Seius, the thing that really matters is that he seeks to insult me; for I am a definite person although he thinks me someone other than I am; and therefore I have the action for insult. 4. But when someone thinks a son-in-power to be a head of household, he cannot be regarded as insulting the son's father any more than he insults her husband when he thinks a woman to be a widow; for no insult is directed to their persons, and there can be no transferring of the imputation to them from the person of the son since the intention of the insulter is directed to the son as being a head of household. 5. But if the wrongdoer knows that his victim is a son-in-power, although he does not know in whose power, I would say, says Pomponius, that the father should be given the action for insult in his own right, so also the husband, if he knows his victim to be a married woman. For one who is not unaware of these facts seeks to insult the father, whoever he be, through the son and likewise the husband through his wife.

19 GAIUS, *Provincial Edict, book 22:* If my creditor, whom I am ready to pay, to my discredit, should call upon my verbal guarantors, he will be liable to me in the action for insult.

20 MODESTINUS, *Replies, book 12:* He replied that if, without the authority of the person who has the right and power to permit such a course, Seia seal up the house of her absent debtor in order to insult him, she can be sued in the action for insult.

21 JAVOLENUS, *Letters, book 9:* Assessment of the insult is to be made as at the time that it was perpetrated and not as at the time that judgment is given.

22 ULPIAN, *Praetor's Edict, book 1:* If a freeman be seized as being a runaway slave, the action for insult lies.

23 PAUL, *Edict, book 4:* Ofilius says that the action for insult lies against one who enters another's house without the latter's permission, even though he be summoning that other to litigation.

24 ULPIAN, *Praetor's Edict, book 15:* If someone be barred by anyone from selling his own slave, he can bring the action for insult.

25 ULPIAN, *Edict, book 18:* If a female slave be debauched, the action for insult will lie; and if the wrongdoer conceal the slave or do something else with a view to theft, the action for theft also, or if it be an adolescent maiden who is debauched, there are those who think that an action under the *lex Aquilia* is also competent.

26 PAUL, *Edict, book 19:* If someone make a mockery of my slave or son, even with his consent, I am regarded as being insulted, as when he takes him into a cook-shop or plays dice with him. But this is so only where the person has the intention of perpetrating an affront. For one can give evil counsel without giving a thought to the master; hence, the need for the action for making a slave worse.

27 PAUL, *Edict, book 27:* Labeo writes that if your father's statue, set over his grave, be smashed with stones, you have not the action for the violation of a tomb but the action for insult.

28 ULPIAN, *Sabinus, book 34:* The action for insult is not regarded as part of our assets until issue has been joined.

29 PAUL, *Sabinus, book 10:* If you manumit or alienate a slave in respect of whom you have an action for insult, you will still be able to bring the action.

30 ULPIAN, *Sabinus, book 42:* Could anyone doubt that a manumitted slave does not have the action for insult in respect of some outrage which he suffered as a slave? 1. If a son-in-power be insulted, although both son and father acquire the action, the assessment of damages will not be the same in each case.

31 PAUL, *Sabinus, book 10:* For the insult to the son can be greater than that to the father by reason of the son's dignified position.

32 ULPIAN, *Sabinus, book 42:* Not even magistrates are allowed to do anything insulting. Hence, if a magistrate be guilty of any affront, whether in his private capacity or acting as a magistrate, he can be sued in the action for insult. But after he has laid down office or even while he is still in office? The better view is that if he be a magistrate who cannot honorably be summoned to litigation, one must wait until he has laid down office. But, if he holds a minor magistracy, that is, one without *imperium*, he can be sued while still in office.

33 PAUL, *Sabinus, book 10:* Where something is done in the public interest according to sound morals, even though it effects an outrage to someone, nevertheless, because

the magistrate does it not to insult but to assert public *maiestas*, he will not be liable to the action for insult.

34 GAIUS, *Provincial Edict, book 13:* If several slaves together beat someone or shout abuse at him, each commits his own offense and, the more of them there are, the greater is the affront. Indeed, there are as many insults as there are participants.

35 ULPIAN, *All Seats of Judgment, book 3:* If an aggravated affront be perpetrated by one who, by reason of his low estate and poverty, has no fear of the action for insult, the praetor must deal severely with the matter and punish the offender.

36 JULIAN, *Digest, book 45:* If I wish to bring the action for insult against a head of household in respect of his son's conduct and he gives a procurator, there will not be deemed to be a defense of the son unless security be given that the judgment will be honored; accordingly, the action will then be granted against the son as not being defended by his father.

37 MARCIAN, *Institutes, book 14:* It is provided by imperial enactments that anything placed on public monuments to someone's dishonor is to be completely removed. 1. Also, under the *lex Cornelia*, it is possible to bring the civil action for insult, condemnation being for a sum assessed by the judge.

38 SCAEVOLA, *Rules, book 4:* It is provided by *senatus consultum* that no one shall carry a representation of the emperor to the odium of another, and anyone acting to the contrary will be put in the public prison.

39 VENULEIUS, *Public Prosecutions, book 2:* No one is allowed to wear dirty garments or to let down his hair on behalf of a defendant unless he be so closely related to him that he could not be obliged, unwillingly, to give evidence against him.

40 MACER, *Public Prosecutions, book 2:* The deified Severus wrote to Dionysius Diogenes as follows: "Being condemned for aggravated insult, you cannot be a decurion. And there will not avail you the error of governors, whether of him who made a declaration in respect of you or of those who, contrary to law, thought you still to be a decurion."

41 NERATIUS, *Parchments, book 5:* A father whose son has been insulted is not to be prevented from bringing two actions, one for the insult to himself, the other for that to his son.

42 PAUL, *Views, book 5:* Appellants should not raise a shouting against a judge; if they do, they will be stigmatized with *infamia*.

43 GAIUS, *Rules, book 3:* One who brings a false action for insult will be condemned by extraordinary process, that is, he will suffer exile or relegation to an island or loss of civic rank.

44 JAVOLENUS, *From the Posthumous Works of Labeo, book 9:* If the owner of the lower premises create smoke to fumigate those of his neighbor above or if the owner of the upper premises throw or pour anything onto those below, Labeo says that the action for insult does not lie. I think this wrong, if it were done with the intention to insult.

45 HERMOGENIAN, *Epitome, book 5:* Nowadays it is normal to deal with insult by extraordinary process, both in respect of the wrong and in respect of the person of the wrongdoer. Slaves are scourged and returned to their owners; freeman of the lower order are beaten with cudgels, and others are punished by temporary exile or by interdiction from something.

11

EXTRAORDINARY CRIMES

1 PAUL, *Views, book 5:* Those who intrude upon or disturb the marriage of others, even if they cannot be charged with a particular crime, are punished by extraordinary process by reason of their proclivity for base desires. 1. It is an affront contrary to sound morals when a person showers another with excrement, smears him with mud and filth, defiles waters, water pipes, or a lake, or contaminates anything to the detriment of the public; against such persons, stern action is taken. 2. One who persuades a boy, abducted by himself or by a corrupt attendant, into indecency or who solicits a woman or girl or does anything for the purpose of impurity or who offers a gift or a reward whereby to induce indecency will, if the offense be complete, suffer capital punishment; if it be not fully effected, he is deported to an island. Corrupt attendants undergo the supreme penalty.

2 ULPIAN, *Opinions, book 4:* Not even veterans are allowed to form illegal gatherings under the guise of religion or of fulfilling some vow.

3 ULPIAN, *Adultery, book 3:* Swindling and actions for despoiling an inheritance are dealt with by process on indictment; but these are not public prosecutions.

4 MARCIAN, *Rules, book 1:* In a rescript, the deified Severus and Antoninus (Caracalla) said that a woman who procured an abortion for herself should be sent into temporary exile by the governor; for it would appear shameful that she could with impunity deprive her husband of children.

5 ULPIAN, *Duties of Proconsul, book 5:* Apart from the action for making a slave worse which lies under the standing edict against one through whose instigation a slave is found to have fled to the emperor's statue to bring his master into disrepute, such a man will be severely dealt with.

6 ULPIAN, *Duties of Proconsul, book 8:* In particular, forestallers and regraters, speculators generally, interfere with and disturb the corn supply, and a check is put upon their avarice both by imperial instructions and by enactments. By imperial instruction, it is provided: "You must further ensure that forestallers and regraters, speculators generally, indulge in no commerce and that the corn supply is not incommoded either by those who hold back what they have bought or by the more affluent who do not wish to sell their wares at a fair price because they anticipate that the next harvest will be less fruitful." The penalties for such persons are varied; for, generally, if they be merchants, they are only banned from trading or, in some cases, relegated to an island, while those of the lower orders are condemned to forced labor. 1. The price of corn is also affected by false measures, concerning which the deified Trajan issued an edict whereby he imposed upon those who used them the penalty of the *lex Cornelia*, just as if, under the statute on wills, a person were condemned because he wrote, sealed or read aloud a will which was false. 2. The deified Hadrian, again, relegated to an island one who used false measures.

7 ULPIAN, *Duties of Proconsul, book 9:* Cut-purses who, exercising forbidden skills in respect of purses, purloin part therein and abstract part and those styled embezzlers, that is, those who direct themselves to another's coffers with a view to theft,

are to be punished more severely than thieves. And so they are condemned to a period of forced labor or are beaten with cudgels and released or are temporarily relegated to an island.

8 ULPIAN, *Duties of Proconsul, book 9:* There are also offenses which it is for the governor to punish as, for example, if someone say that his records are noised abroad; for the prosecution of this matter was entrusted to the prefect of the city by the deified brothers.

9 ULPIAN, *Duties of Proconsul, book 9:* There are activities which allow of punishment according to the custom of the province. For instance, in the province of Arabia, σκοπελισμόν is called a crime. Its nature is this: a number of enemies σκοπελίζειη the land of the person to whom they are hostile, that is, they place stones as a sign that if anyone cultivate that land, he will die horribly by reason of the plot of those who place the stones; this creates such fear that no one dares to approach this land, fearing the maleficence of those who place the stones. Such conduct the governor should punish severely, even with the capital penalty; for the very act threatens death.

10 ULPIAN, *Duties of Proconsul, book 9:* In Egypt, one who breaks or pulls down the embankments (that is, the mounds designed to contain the waters of the Nile) is also punished by extraordinary process. And according to their station and the measure of their guilt, they are condemned; for some are condemned to forced labor and others to the mines, those to the mines, variously according to their social position. If someone dig up sycamore trees, this offense is treated by extraordinary process with no light penalty because these trees firm up the embankments of the Nile, whereby its floods are regulated and directed. Equally, reductions in the flow are punished; also dikes, sluices, and breaches made in the embankments bring punishment on those responsible.

11 PAUL, *Views, book 1:* And an action is allowed, according to the magnitude of the offense, against itinerant traders who carry around and produce snakes, if anyone be harmed by fear of them.

12

VIOLATION OF A TOMB

1 ULPIAN, *Praetor's Edict, book 2:* The action for violation of a tomb entails *infamia.*

2 ULPIAN, *Praetor's Edict, book 18:* If someone destroy a tomb, the action under the *lex Aquilia* no longer has any application; the [interdict] against force or stealth will have to be brought; Celsus says the same in respect of a statue torn from a funeral monument. He also asks whether something which was not soldered thereto or otherwise affixed remains part of our assets or becomes part of the monument. And Celsus says that it is part of the monument, as would be an ossuary, and, therefore, there is scope for the interdict against force or stealth.

3 ULPIAN, *Praetor's Edict, book 25:* The praetor says: "Where it be said that a tomb has been violated by someone's evil design, I will give an *actio in factum* against him so that he be condemned for what is right and fitting to the person affected. If there be no such person or if he does not wish to sue, I will give an action for a hundred gold pieces to anyone who does wish to take action. If there be several who wish to take proceedings, I will grant the power of suing to him whose cause appears most meritorious. And if anyone dolosely live in a tomb or has some other establishment in what

was built as a tomb, I will give an action against him for two hundred gold pieces to anyone who wishes to proceed against him on that account." 1. The first words show that he alone is to be punished for this, who deliberately violates a tomb; if he lack evil intent, the edict has no place. Hence, persons incapable of such intent, such as *impuberes* as also all who approach with no intention of violating a tomb, are exempt. 2. By "tomb" we understand any place of burial. 3. If someone inter in an hereditary tomb, he may, even though an heir, be liable for violating the tomb, if he does so in contravention of the will of the testator; for as a rescript of the Emperor Antoninus [Caracalla] provides, a testator is entitled to stipulate that someone should not be buried there; and his wish is to be respected. Hence, if he provide only one of his heirs shall do the burying, care will be taken that it is only that one who inters. 4. In the edict of the deified Severus, whereby it is directed that corpses are not to be detained, molested, or forbidden transport through the territory of towns, it is provided that corpses not yet committed to perpetual interment may be moved. And the deified Marcus ruled that those who, on the journey to the tomb, carry the corpse through a village or town do not merit punishment, although such things should not be done without the permission of those authorized to allow such progress. 5. The deified Hadrian in a rescript prescribed a penalty of forty gold pieces, payable to the imperial treasury, for those who bury bodies in a city, as also for the magistrates who allow it, and he directed that the place of burial should be expropriated and the corpse moved elsewhere. What if the municipal law allows burial in the city? We must consider whether, in the light of imperial rescripts, this provision has to be departed from; for the rescripts are of general scope and imperial legislation has its own force and should apply everywhere. 6. Anyone who so wishes may proceed against a person who lives or makes his dwelling in a tomb. 7. As the deified Severus ruled in a rescript, provincial governors are to take severe action against those who despoil corpses, especially if they do so with armed force; if, in the manner of brigands, they do such things armed, they suffer the death penalty; if without arms, they are sentenced to the mines. 8. Those judging an action for the violation of a tomb will assess the damage, taking into account the scale of the wrong, the gain made by the violator, the damage which he has done, and his audacity; but they must never condemn for less than they would if an outsider brought the action. 9. If several have the right of sepulture, do we give the action to each of them or only to him who has exercised it? Labeo rightly says that each of them has the action because he is suing for his individual interest. 10. If the party interested does not wish to bring the action for the violation of a tomb, he can change his mind, before issue has been joined by another plaintiff, and say that he now wishes to sue and be heard. 11. If a slave live or build in a tomb, the noxal action ceases and the praetor grants this action in respect of him; but if the slave does not live there but has a resting place there, the noxal action will be given assuming that one appears to lie. 12. This is a popular action.

4 PAUL, *Praetor's Edict, book 27:* The tombs of enemies have no religious significance for us. Hence, we can take stones from them and put them to any use, and the action for violating a tomb will not lie.

5 POMPONIUS, *From Plautius, book 6:* Our rule is that the owners of land on which they have erected tombs, still have the right of access thereto even after they sell the land. For the terms of sale of land provide that there shall be access and passage for funerals to tombs on the land.

6 JULIAN, *Digest, book 10:* The action for violation of a tomb is given in the first place to the person who has an interest in it. Failing him, if someone else shall have brought the action, then, even though the person best entitled has been away on state business, he will not be given the action over again, on his return, against one who has been condemned in damages. And the person who was away on state service should not be regarded as suffering a disadvantage through this, because this action pertains not to his family affairs but rather to punishment.

7 MARCIAN, *Institutes, book 3:* It is forbidden to let tombs deteriorate; but it is permissible to rebuild a monument which has fallen in but without touching the corpses.

8 MACER, *Public Prosecutions, book 1:* The offense of violating a tomb can be said to come under the *lex Julia de vi publica,* falling within that part of the statute wherein it is provided that nothing shall be done to prevent a person being buried and entombed; for one who violates a tomb does prevent the occupant from being entombed.

9 MACER, *Public Prosecutions, book 2:* In respect of a violated tomb, an action for pecuniary damages is also given.

10 PAPINIAN, *Questions, book 8:* The question was asked whether the action for the violation of a tomb lay to a *heres necessarius* who did not concern himself with the estate. I said that he could properly bring this action which derives from what is good and right. For even if he does take proceedings, he will not be in fear of creditors of the estate since, although this action comes with the inheritance, it is not acquired through the will of the deceased, nor does it lie for the recovery of a thing, but it is directed simply to punishment.

11 PAUL, *Views, book 5:* Those guilty of violating tombs, if they remove the bodies or scatter the bones, will suffer the supreme penalty if they be of the lower orders; if they be more reputable, they are deported to an island. Otherwise, the latter will be relegated and the former condemned to the mines.

13

EXTORTION WITH MENACES

1 ULPIAN, *Opinions, book 5:* If extortion occurs on the pretended order of the governor, the governor of the province will order the return of what has been obtained and will punish the wrong.

2 MACER, *Public Prosecutions, book 1:* The process for extortion is not public; but if a person receive money because he has threatened to accuse someone, there can be a public prosecution under the *senatus consulta* which extend the penalty of the *lex Cornelia* to those who conspire to accuse the innocent or who accept money for laying or refraining from accusation or for giving or not giving evidence.

14

CATTLE THIEVES

1 ULPIAN, *Duties of Proconsul, book 8:* On the punishment of cattle thieves, the deified Hadrian sent the following rescript to the council of Baetica: "Since cattle thieves are to be most severely punished, they are usually condemned to death. But condign

punishment does not apply everywhere but only in places where this sort of offense is rife. In other cases, they are condemned to forced labor, sometimes temporary." 1. Correctly speaking, they are offenders of this kind who drive off beasts from pastures or herds and ravage in some way, and they practice their activity almost as an art, driving away horses and oxen from their herds. But if someone take off a straying ox or horses left in the wilds, he is not a cattle thief as such, rather an ordinary thief. 2. Those who make off with a pig or goat or a wether should not be punished so severely as those who drive off the larger beasts. 3. Now although Hadrian prescribed the mines, forced labor, and even death as punishments, those born of respectable rank should not be subjected to such punishment but should be relegated to an island or removed from their civic order. Those who drive off cattle at swordpoint are not improperly exposed to the beasts. 4. One who drives off cattle, over the ownership of which he has raised a dispute, should be remitted, as Saturninus writes, to civil proceedings. This, however, is to be accepted only where he makes a claim of right in good faith and not as a pretext for thieving.

2 MACER, *Public Prosecutions, book 1:* The offense of cattle stealing is not dealt with by a public prosecution, because it is rather a form of theft. But since cattle thieves frequently employ arms, it is accepted that if they be apprehended, they are to be severely punished.

3 CALLISTRATUS, *Judicial Examinations, book 6:* According to the number of sheep driven off, a man will be an ordinary thief or a cattle thief. Some held the view that ten sheep make a flock; and if four or five pigs or even a single horse or ox be driven off, the offense of cattle stealing is committed. 1. Punishment should be more severe for one who drives off a broken-in animal from its stall and not from the woods or a herd. 2. Those who have often committed this offense, although they take only one or two animals, are cattle thieves. 3. The penalty for those who harbor cattle thieves is laid down in a letter of the deified Trajan; they are to be relegated from the land of Italy for ten years.

15

COLLUSION

1 ULPIAN, *Praetor's Edict, book 6:* A double dealing prosecutor, a prevaricator, is like one straddling both sides; for he assists the other party, betraying his own client. Labeo says that the term derives from a manifold contest; for the prevaricator acts on both sides, not on one alone. 1. He is properly called a prevaricator who prosecutes in a public prosecution; an advocate is not correctly so styled. What happens to him?

Whether he is in collusion in private or in public proceedings, he is punished by the extraordinary process.

2 ULPIAN, *Duties of Proconsul, book 9:* It should be known that nowadays one guilty of collusion is punished by the extraordinary procedure.

3 MACER, *Public Prosecutions, book 1:* The action for collusion is sometimes public, sometimes introduced by practice. 1. For if the defendant in a public proceeding assert to his accuser that he has been previously charged with the same offense by someone else and been acquitted, it is provided by the *lex Julia* on public prosecutions that the present proceedings cannot go on until the collusion of the previous accuser has been established and a declaration thereof made. And so the declaration of such collusion is held to be in public proceedings. 2. But if the charge of collusion be leveled against an advocate, the proceedings are not public, and it does not matter whether he be alleged to have been in collusion in public or in private proceedings. 3. Hence, if someone be accused on a charge that he abandoned a public prosecution, the proceedings will not be public, because no provision therefor is made in any statute and no public process was introduced by the *senatus consultum* which prescribes a penalty of five pounds of gold for one who abandons a prosecution.

4 MACER, *Public Prosecutions, book 2:* If someone, for whose bringing a false accusation process is not permitted, be declared guilty of collusion in a public prosecution, he will become *infamis.*

5 VENULEIUS SATURNINUS, *Public Prosecutions, book 2:* An accuser who is convicted of collusion is by statute not allowed to prosecute again.

6 PAUL, *Public Prosecutions, sole book:* In a rescript of our emperor and his father, it has been ruled that those guilty of collusion in respect of offenses dealt with by extraordinary proceedings shall be subject to the same penalty, as that to which they would be liable if they had themselves contravened the statute, of the contravention of which the defendant has been acquitted by reason of their collusion.

7 ULPIAN, *Census, book 4:* In all cases save those involving the issue of blood, one who buys off the accuser is to be condemned under the *senatus consultum.*

16

HARBORERS

1 MARCIAN, *Public Prosecutions, book 2:* Of the basest is the class of harborers without whom no one could long lie low; and it is ordained that they should be treated like brigands. Those who, when they could apprehend brigands, let them go on receipt of money or a share of their loot, are in the same category.

2 PAUL, *Civilian Penalties, sole book:* Those who harbor a brigand who is a relative by blood or marriage should neither be absolved nor yet severely punished. For their offense is not equal to that of those who harbor brigands with whom they have no connection.

17

THIEVES WHO LURK ABOUT BATHS

1 ULPIAN, *Duties of Proconsul, book 8:* Thieves by night are to be dealt with by extraordinary process and, on the investigation of the matter being completed, punished, provided that we bear in mind that a reasonable limit of temporary forced

labor be not exceeded. The same applies to thieves from the baths. But if thieves defend themselves with weapons, or burglars and their like strike someone, they are to be sent to the mines or, if of respectable rank, banished.

2 MARCIAN, *Public Prosecutions, book 2:* But if they commit a theft in the daytime, they are to be subjected to civil proceedings.

3 PAUL, *Military Penalties, sole book:* A soldier caught stealing in the baths is to be discharged with ignominy.

18

BREAKERS OUT OR IN AND ROBBERS

1 ULPIAN, *Duties of Proconsul, book 8:* The deified brothers, in a rescript to Aemilius Tiro, ruled that those who break out of prison and escape are to be punished. And Saturninus endorses the view that those who break out of prison, whether by breaking down the doors or through a conspiracy with others detained like themselves, are to be punished by death; but if they escape through the laxity of the jailers, their punishment should be less severe. 1. Robbers, who are more heinous thieves (that is, plunderers), are normally condemned to forced labor, whether in perpetuity or for a limited period, because those of better class are removed for a time from their civic rank or directed to quit the boundaries of the homeland. For them, no particular penalty is prescribed by imperial rescripts, and so their punishment is a matter for the discretion of the person conducting the *cognitio*, once the investigation is completed. 2. Cutpurses, pickpockets, and burglars are to be similarly punished. For the deified Marcus directed that a Roman knight, who was a burglar and who, having broken down and penetrated a wall, stole some money, should keep away from the province of Africa from which he came, the city of Rome, and Italy as a whole for five years. Punishment should, though, be inflicted on burglars and the others listed above after the hearing of the case, according to what comes out in the hearing, provided that, in the case of the lower orders, it does not go beyond forced labor and, for those of gentler rank, banishment.

2 PAUL, *Duties of Prefect of the City Guard, sole book:* The punishment for burglars varies. For nocturnal intruders are the more heinous, and so, having been cudgeled, they are usually sent to the mines. But those who break in by day, having been similarly beaten, are sentenced to forced labor for life or for a term.

19

THE DESPOILED INHERITANCE

1 MARCIAN, *Institutes, book 3:* If someone plunder the inheritance of another, he is to be punished by extraordinary process on being charged with such offense, as is laid down in a proposal of the deified Marcus.

2 ULPIAN, *Duties of Proconsul, book 9:* If a charge of despoiling an inheritance be laid, the provincial governor must arrange to investigate it; for, where no action for theft can be brought, there remains only the aid of the governor. 1. It is clear that

this offense can be alleged in a case where no action for theft can be brought, that is, before the inheritance has been accepted or, although it has been accepted, the heir has not taken possession of the assets. For it is obvious that in such circumstances, no action for theft will lie; but it is no less obvious that the action for production will lie, if the plaintiff wish to bring a *vindicatio* for what is produced.

3 MARCIAN, *Public Prosecutions, book 2:* Antoninus and the deified Severus provided in a rescript that a party has the choice whether to prosecute the offense of despoiling an inheritance by extraordinary process before the prefect of the city or the provincial governor or to bring a *vindicatio* for the inheritance from those possessing it, under the ordinary law.

4 PAUL, *Replies, book 3:* Hereditary goods belong to all the heirs in common, and so the heir who successfully institutes proceedings for the offense of despoiling the inheritance is regarded as also benefiting his co-heir.

5 HERMOGENIAN, *Epitome of Law, book 2:* A wife cannot be accused of the offense of despoiling an inheritance because one could not proceed against her for theft either.

6 PAUL, *Neratius, book 1:* If you appropriate a thing, part of an inheritance, being unaware that it is so, he replied that you are guilty of theft. PAUL. There can be no theft of a thing part of an inheritance any more than of anything which has no owner and the belief of the appropriator alters nothing.

20

SWINDLING

1 PAPINIAN, *Replies, book 1:* Process for swindling ranks neither as public nor as private process.

2 ULPIAN, *Sabinus, book 8:* The action for swindling does not indeed involve *infamia*, but the offense is punished by extraordinary process.

3 ULPIAN, *Duties of Proconsul, book 8:* A charge of swindling is a matter for investigation by the provincial governor. 1. It should be known that this charge can be leveled against those guilty of fraud but against whom no specific offense can be alleged. For what the action for fraud is in the field of private litigation, that is, the prosecution of swindling in the matter of offenses. And so, wherever the name of a specific offense is lacking, there we can charge swindling. It is particularly relevant in the following cases: Suppose that a person, having pledged something to another, conceal this obligation and, by cunning, sell the thing or give it in exchange or by way of satisfaction to a third party; these are all cases of swindling. Again, if he substitute goods which he has sold or divert elsewhere or ruin those which are subject to security rights, he is equally guilty of swindling. So also if he be guilty of some imposture or collusion to another's detriment, he can be charged with swindling. But as I have said generally, in the absence of a specific offense, this charge can be brought, and there is no need to list the instances. 2. The penalty for swindling is not laid down by statute; for it is not a statutory offense. But those guilty are punished by extraordinary process. In the case of the lower orders, the penalty is not to exceed condemnation to the mines; those who have some position of rank, however, are to be temporarily relegated or removed from their civic order. 3. In particular, a person who conceals wares can be charged with this offense.

4 MODESTINUS, *Penalties, book 3:* There will be a charge of swindling for perjury when someone swears in writing that what are pledges belong to him and he will be sent into temporary exile.

21

REMOVAL OF A BOUNDARY STONE

1 MODESTINUS, *Rules, book 8:* There is no pecuniary penalty for uprooting boundary stones, but punishment is administered according to the rank of the offender.

2 CALLISTRATUS, *Judicial Examinations, book 3:* The deified Hadrian issued a rescript in the following form: "There can be no doubt that those who move stones set to mark boundaries are guilty of a most heinous act. The extent of the penalty, however, should be determined in the light of the rank and intent of the offender. If those convicted be of high rank, they have doubtless done it to encroach on someone else's land, and they may be relegated for a period according to their age; thus, if they be young, it will be a longer period, if they be elderly, shorter. But if the offenders be acting on behalf of another and performing some service, they are to be beaten and sent to forced labor for two years. If they appropriate the stones through ignorance or casually, it is enough that they be thrashed."

3 CALLISTRATUS, *Judicial Examinations, book 5:* A pecuniary penalty is imposed upon those who deliberately move established boundary stones out of their position and territory under the agrarian statute introduced by Gaius Caesar; for the statute provides that fifty gold pieces shall be paid to the public treasury for each stone thrown away or moved and that anyone who wishes may bring the proceedings. 1. Another agrarian law, introduced by the deified Nerva, provides that if a slave, male or female, should deliberately so act without the knowledge of his or her owner, he or she is to be put to death unless the master or mistress be prepared to accept a fine. 2. Those, again, who, to confuse boundary issues, change the face of the land, for example, making a plantation out of tilled land or making arable land of a wood or doing something else of the sort, will be punished according to their rank and degree and the violence of what they have done.

22

COLLEGIA AND ASSOCIATIONS

1 MARCIAN, *Institutes, book 3:* Provincial governors are directed by imperial instructions not to tolerate secret social *collegia* and that soldiers are not to form *collegia* in camp. But the lower orders are allowed to pay a small monthly fee, provided that they meet only once a month, lest an unlawful association be created under this guise. And the deified Severus stated in a rescript that this applies not only at Rome but also in Italy and the provinces. 1. There is, however, no ban on assembly for religious purposes, so long as there is no contravention of the *senatus consultum* which prohibits unlawful *collegia*. 2. It is not permitted to belong to more than one *collegium*, as

was laid down by the deified brothers; and if someone belong to more than one, it is provided by rescript that he must choose the one to which he wishes to adhere and receive from the association which he leaves the share of the common fund which is due to him.

2 ULPIAN, *Duties of Proconsul, book 6:* Anyone instituting an unlawful association will be liable to the penalty imposed upon those found guilty of occupying public places or temples with armed men.

3 MARCIAN, *Public Prosecutions, book 2:* If there be any unlawful *collegia*, they are dissolved under imperial instructions and rulings and *senatus consulta*; but on their dissolution, it is permissible for the members to share out between them any common funds that exist. 1. Above all, unless an association or other such body be formed with the authority of a *senatus consultum* or of the emperor, it is created in contravention of the *senatus consultum* and of imperial instructions and rulings. 2. Slaves, too, with the consent of their masters, may be admitted to the associations of the lower orders; those in charge of such associations should know that if they admit slaves to such associations without the master's knowledge or consent, they will henceforth be liable to a penalty of a hundred gold pieces per slave.

4 GAIUS, *XII Tables, book 4:* Co-members are those who belong to the same association, what the Greeks call an ἑταιρεία. A statute gives them the power to enter into any agreement they like, so long as they do not contravene the public statute. This statute appears to have been adopted from the law of Solon which says: "If the inhabitants of a city district or precinct be in association for the purpose of holding religious feasts or of dining together or to provide for their burial or if they be members of the same club or they combine to engage in some enterprise or for profit, anything that they agree between themselves will be valid unless forbidden by public statutes."

23

POPULAR ACTIONS

1 PAUL, *Edict, book 8:* We describe as a popular action one which looks to the public interest.

2 PAUL, *Edict, book 1:* If more than one wish to bring the action, the praetor will choose the most suitable plaintiff.

3 ULPIAN, *Edict, book 1:* But, if proceedings be brought more than once on the same ground, the common defense of *res judicata* will lie. 1. In the case of popular actions, preference is given to the person who has an interest in bringing the proceedings.

4 PAUL, *Edict, book 3:* A popular action is granted to a competent person, that is, one whom the edict allows to bring proceedings.

5 PAUL, *Edict, book 8:* The defendant in a popular action can appoint a procurator to conduct his defense, but the plaintiff cannot proceed through a procurator.

6 ULPIAN, *Edict, book 25:* Women and *pupilli* are not granted a popular action unless the matter is one which affects them.

7 PAUL, *Edict, book 41:* Popular actions are not transmissible to one to whom an inheritance is handed over under the *senatus consultum Trebellianum.* 1. Again, a person who has such an action is not regarded as being enriched thereby.

8 ULPIAN, *Edict, book 1:* No popular action is transmissible to heirs or is available for more than a year.

BOOK FORTY-EIGHT

1

CRIMINAL PROCEEDINGS

1 MACER, *Criminal Proceedings, book 1:* Not all trials in which an offense is concerned are public criminal trials, but only those which arise from the statutes on criminal proceedings, such as the *lex Julia* on treason, the *lex Julia* on adultery, the *lex Cornelia* on murderers and poisoners, the *lex Pompeia* on parricide, the *lex Julia* on embezzlement, the *lex Cornelia* on wills, the *leges Juliae* on *vis privata* and *vis publica*, the *lex Julia* on electoral corruption, the *lex Julia* on extortion, and the *lex Julia* on the corn dole.

2 PAUL, *Praetor's Edict, book 15:* Some criminal proceedings are capital while others are not. Capital [proceedings] are those where the penalty is death or exile, which here means interdiction from fire and water, because by these penalties civil status is taken away. Other [sentences] are not properly referred to as exile but as relegation; for in them citizenship is retained. Noncapital [proceedings] are those where the penalty is a fine or some form of corporal punishment.

3 ULPIAN, *Sabinus, book 35:* A public accusation lapses, should the person charged, male or female, die beforehand.

4 PAUL, *Edict, book 37:* It sometimes happens that there may be a preliminary inquiry by means of a private action before a criminal trial, such as an Aquilian action, an action for theft or for the removal of goods by force, or an interdict against force or for the production of a will; for in these cases matters concerning the *familia* are at issue.

5 ULPIAN, *Disputations, book 8:* Someone who has been charged must clear himself and cannot bring an accusation until he has been discharged; for it is recognized in the constitutions that a charged person is cleared, not by bringing a counter charge, but by his innocence. 1. It is not certain whether he can only bring an accusation if he has actually been found not guilty, or [if he can do so] when he has undergone the penalty; for it has been laid down by our emperor and his deified father that after being found guilty a person cannot begin an accusation. I think, however, that this applies only to those who have lost citizenship or freedom. 2. It is clearly permissible for those who have initiated prosecutions before being found guilty to carry them through afterward.

6 MARCIAN, *Institutes, book 14:* On the death of a person who was charged with an offense and the penalty ceasing to have effect, [the judge] who has cognizance in pecuniary matters ought to have cognizance in any cause whatsoever arising from the now nonexistent charge.

7 MACER, *Criminal Proceedings, book 2:* It is not a conviction for every offense that makes [a man] infamous, but only that charge which stemmed from criminal proceedings. Thus, where the offense was not a matter for public criminal proceedings, infamy will not attach to the condemned man, unless the charge arose from an action which, even in a private trial, brings infamy on him, such as for theft, the removal of goods by force, or *injuria*.

8 PAUL, *Criminal Proceedings, sole book:* The [former] system of [courts] dealing with capital offenses has fallen out of use; however, the penalties under the statutes [setting up that system] still survive when charges are proved *extra ordinem.*

9 MARCIAN, *Criminal Proceedings, book 1:* It is to be noted that if [a master] does not defend his slave who has been accused on a capital charge, this is not to be regarded as abandoning him; and accordingly, if [the slave] is acquitted he does not become free but remains his master's property.

10 PAPINIAN, *Definitions, book 2:* As between accuser and accused, once the trial has begun, an excuse for absence is to be allowed for good cause; nor is the accused to be condemned [even] if he has been cited three times a day over a three-day period; nor, if the accused is present, may a verdict of calumny be pronounced on the absent accuser.

11 MAECIAN, *Criminal Proceedings, book 10:* A slave may equally well be defended by his master's *procurator* as by his master.

12 MODESTINUS, *Penalties, book 3:* [The judge] who is going to hear persons in custody in a *civitas* of the province which he governs must summon both the men of senatorial rank and all the patrons of causes, if they live in that *civitas.* 1. And it is laid down in a rescript that those in custody can be heard on ferial days, so that [the judge] may discharge the innocent and may continue [the cases of] the guilty who need more severe punishment.

13 PAPINIAN, *Replies, book 15:* On the death of an accuser, the case may be carried through by someone else at the discretion of the provincial governor. 1. A *procurator* intervenes in vain to follow up a charge in a criminal trial, and even more so in the case of the defense; but the excuses of those who are absent are to be brought to the attention of the judges in accordance with the *senatus consultum,* and if there is good reason for them, sentence is postponed.

14 PAPINIAN, *Replies, book 16:* The provincial governor had pronounced sentence for calumny on a father after certain slaves of his son-in-law had been accused by the father-in-law of poisoning [his daughter]. I gave the opinion that the father of the dead woman was not to be reckoned as infamous, since, even if criminal proceedings had been mounted between free persons over the death of the daughter, the father might make an accusation without risk.

2

ACCUSATIONS AND INDICTMENTS

1 POMPONIUS, *Sabinus, book 1:* A woman is not permitted to charge someone in criminal proceedings unless, indeed, she is pursuing the death of her parents or children, her patron or patroness, or their son or daughter or grandson or granddaughter.

2 PAPINIAN, *Adulteries, book 1:* In certain cases, women are allowed to bring a public accusation, for instance, if they are pursuing the death of those persons, male or female, against whom, under the statute on criminal [proceedings], they do not give testimony against their will. And the senate made similar provision in the *lex Cornelia* on wills; but women are allowed to speak in criminal proceedings about the will of their father's or mother's freedman. 1. A *pupillus* is permitted, with the approval of his tutors, to pursue the death of his father or grandfather, and the same is allowed to a female in pupillage; but the deified Vespasian in accordance with the [Cornelian] law

on wills permitted pupils to raise an action about the will of their father [only], and he did not permit [this] about other [wills]; but they can proceed by interdict as if the will were not produced.

3 PAUL, *Adulteries, book 3:* The layout of forms of indictment is as follows:

"Consul and date. L. Titius announces in the presence of 'S,' praetor or proconsul, that he accuses Maevia under the *lex Julia* on adultery, stating that she has committed adultery with G. Seius in the *civitas* of 'A,' at the house of 'B,' in the month of 'C,' in the consulship of 'D' and 'E.'" For there must certainly be set out the place in which the adultery was committed, the person with whom it is said to have taken place, and the month; for this is laid down by the *lex Julia* on criminal proceedings and is a general requirement for all those who bring a charge against another; but he shall not include the day and hour unless he wishes. 1. But if the documents of indictment are not set out in legal form, the name of the one charged is deleted, and there shall be power to renew the charge all over again. 2. Again, the person who lodges the accusation must sign his declaration, or someone else [must do so] on his behalf if he is illiterate. 3. However, if he is bringing a further charge, for example, that someone made his house available for a *stuprum* against a *mater familias*, [or] that he let go an adulterer caught in the act, [or] that he accepted a bribe for a detected *stuprum* and anything else of this kind, it must be included in the accusation. 4. Should the accuser die, or should there be any other obstacle to his bringing the accusation, or anything else of the kind, the name of the one charged is deleted if he so requests; and this is laid down by the *lex Julia de vi* and the *senatus consultum*, but in such a manner that it is permissible for someone else to start the accusation over again. We shall see within what time this may be done; the thirty *dies utiles* must certainly be observed.

4 ULPIAN, *Adulteries, book 2:* A person condemned in criminal proceedings has no right to bring an accusation, unless he is pursuing the death of his children [or parents], or of his patrons in that trial, or matters touching himself. Furthermore, the right of accusation is taken away from those who are branded with calumny, as also from those who have been sent to the arena to fight with the beasts, from stage players and pimps, or from anyone adjudged in criminal proceedings to have done anything by way of *praevaricatio* or calumny, or found to have accepted money for the purpose of bringing an accusation or of causing trouble for someone.

5 ULPIAN, *Adulteries, book 3:* There is no doubt that slaves also can be accused of adultery; but those who are debarred from accusing freemen of adultery will also be debarred from accusing slaves. Under a rescript of the deified Marcus, a master may institute an accusation even against his own slave. Accordingly, after this rescript, the master will be under the necessity of instituting a [formal] accusation against his slave, but the married woman will lawfully make use of a *praescriptio* [that the slave must be condemned first].

6 ULPIAN, *Duties of Proconsul, book 2:* Minor charges should be heard and investigated by the proconsul out of court. He should either free those against whom they are brought, or have them beaten with rods, or, if they are slaves, flogged.

7 ULPIAN, *Duties of Proconsul, book 7:* If a charge is to be brought against anyone, the charge must first be signed. This [procedure] was devised so that no one should readily leap to an accusation since he knows that his accusation will not be brought without risk to himself. 1. Everyone, therefore, specifies what charge he is bringing and, furthermore, that he will persevere with the charge until sentence. 2. The governor must not allow a man to be charged with the same offenses of which he has already been acquitted, and the deified Pius sent a rescript to Salvius Valens in these terms; but it must be considered whether this means that he cannot be charged by the same accuser, or not by anyone else as well. I should think that since matters which have been decided between others do not prejudice a third party, if the person who has now come forward as accuser be pursuing his own injury and shows that he had not known that an accusation had [previously] been brought by another, if there is good rea-

son he is to be allowed to be an accuser. 3. If, however, a man is prosecuted on one charge by a person who has [already] brought a false accusation against him on another, I think that he who has once been guilty of calumny should not readily be heard; although the deified Pius sent a rescript to Julius Candidus that the son of the accuser ought to be allowed to bring another accusation against a person accused by his father. 4. The same emperor wrote in a rescript that slaves should be punished in the place where they are accused of having committed their offense; and their master, if he wishes to defend them, cannot have them sent back into his own province, but must defend them where they committed the crime. 5. When sacrilege had been committed in one province and thereafter a lesser offense in another, the deified Pius sent a rescript to Pontius Proculus that after he had investigated the offense in his own province, he should send the man charged back to the province where he had committed sacrilege.

8 MACER, *Criminal Proceedings, book 2:* We shall understand who can bring an accusation if we know those who cannot. Thus, some may be debarred from making an accusation on grounds of sex or age, for example, a woman or a pupil; some because of their oath of allegiance, for example, those performing military service; some because [they hold] a magistracy or office acting under which they cannot with impunity be summoned to court; some because of their own offenses, such as the infamous; some because of their unsavory method of making money, such as those who have lodged two actions against two accused or take money to bring or not to bring an accusation; and some because of their status, such as freedmen against their patrons;

9 PAUL, *Views, book 5:* others because of suspicion of calumny, such as those who have been suborned and given false testimony;

10 HERMOGENIAN, *Epitome of Law, book 6:* some on account of poverty, such as those who possess less than fifty aurei.

11 MACER, *Criminal Proceedings, book 2:* All these, however, if they are pursuing a wrong done to themselves or are obtaining satisfaction for the death of those close to them, are not excluded from lodging an accusation. 1. To protect their own interests, children and freedmen are not to be prohibited to protect their own interests, from making a complaint of something done by their parents or patrons, as, for example, if they allege that they have been forcibly expelled from possession by them, that is, not in order to bring a charge of *vis* against them, but to recover possession. Again, a son is not indeed prohibited from making a complaint of the action of his mother, if his charge is that she has fraudulently substituted a child so that he has a co-heir; but he is not permitted to bring a charge against her under the *lex Cornelia* [*testamentaria*]. 2. Someone cannot accuse a person who has been accused by another; but if that person is removed from the list of those charged, whether because of a public or private amnesty or because of the withdrawal of the accuser, another person is not forbidden to accuse him.

12 VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* One may not accuse these persons: an imperial legate, that is, the governor of the province, in the opinion of Lentulus given in the consulship of Sulla and Trio; a legate of a provincial governor, at least in respect of an offense which he committed before he took up his office; also magistrates of the Roman people, or any person who has been absent on public service, as long as he is not absent for the purpose of evading the law. 1. Even men listed among those charged can make use of this privilege if they contend that, with the intervention of an amnesty, an action against them ought not to be renewed, in accordance with the letter of the deified Hadrian written to the consul Glabrio. 2. There is provision in the *lex Julia* on criminal proceedings that no one is to lodge simultaneous complaints against two accused, unless on account of outrages suffered by himself.

3. If a slave be cited as accused, the same procedures shall be observed as if he were a freeman in accordance with the *senatus consultum* given in the consulship of Cotta and Messala. 4. Slaves are liable to be charged under all laws except the *lex Julia de vi privata*, because those condemned under that law are punished by the confiscation of one third of their property, a penalty which does not apply to a slave. The same must be said of other laws under which a pecuniary penalty is inflicted, or even a capital penalty, such as relegation, which is not suitable as a penalty for a slave. Again, the *lex Pompeia* on parricide is not [applicable] since its first chapter covers those who have killed their parents, blood relations, or patrons; so far as the words go these do not apply to slaves, but when the essence of the case is the same, a similar punishment will be imposed on them also. Again, under the [*lex*] *Cornelia* on *injuria*, Cornelius Sulla was the authority [for saying] that a slave should not be accused; but a more severe penalty *extra ordinem* will threaten him.

13 MARCIAN, *Criminal Proceedings, book 1:* The deified Severus and Antoninus wrote in a rescript that for the public benefit a woman bringing an accusation relating to the corn dole is to be heard by the prefect of the corn dole. Infamous persons also are admitted as accusers without any doubt. Soldiers also, who are unable to bring other accusations, because they are on guard to keep the peace, should all the more be allowed to make this accusation. Even slaves are heard [when] bringing this charge.

14 PAUL, *Duties of Proconsul, book 2:* The senate has ruled that a person cannot be charged on account of the same crime under several statutes.

15 ULPIAN, *Edict, book 56:* A person, bringing an action against another by whose malicious intention it is alleged that men were brought together and financial loss caused, should not be compelled to bring a criminal charge to the exclusion of any civil action.

16 ULPIAN, *Duties of Consul, book 2:* In criminal proceedings, should there be a number of persons wishing to bring accusations against one man, the judge must choose the accuser, having taken account of the case and assessed the persons of the accusers, whether by reference to their status, their interest in the matter, their age, their morals, or any other good reason.

17 MODESTINUS, *Distinctions, book 6:* If a master defends his slave on a capital charge, he is required to pledge his appearance by giving bail.

18 MODESTINUS, *Replies, book 17:* When Titia threatened to prove that the will of her brother Gaius was forged and had not completed the formalities of the accusation within the time determined beforehand by the governor, the provincial governor laid down for a second time that she could not speak further about the forged will. Titia did not appeal against this decision, but said that [even] after the end of the time [allowed] she maintained the will was void. My question is whether Titia, who did not appeal against the decision of the governor, can thereafter return to the accusation of forgery. The response was that no evident grounds had been put forward [to show] why, against the weight of his decision, she should be given a hearing in her action for forgery.

19 CALLISTRATUS, *Judicial Examinations, book 5:* The deified brothers stated in a rescript that the heirs of accusers should not be compelled to pursue their charges. 1. Again, the deified Hadrian stated in a rescript that an accuser must not be compelled to charge more than one person.

20 MODESTINUS, *Punishments, book 2:* In offenses dealt with under criminal proceedings, the penalties of forfeiture of property apply against the heirs only if the case was defended and condemnation followed, with the exception of a trial for extortion or treason, which [penalties] may [in those instances] be enforced even against accused who have died with the case incomplete, so that their goods may be claimed for the imperial treasury. So, as the deified Severus and Antoninus wrote in a rescript that from the time that any person incurred any charge on these grounds, he could not dispose of any of his property or manumit [any of his slaves]. But with other offenses

the penalty can be imposed on the heir in the first place if and only if the accusation was lodged during the lifetime of the accused, even if condemnation did not follow.

21 PAPINIAN, *Replies, book 15:* Someone charged with a capital offense while the charge is yet unproved, is not barred from denouncing a case to the imperial treasury.

22 PAPINIAN, *Replies, book 16:* Someone charged [who comes from] another province is accused and condemned [in the province of] those in whose territory the crime is shown to have been committed. Our excellent emperors have written in general terms in their rescripts that this principle should also be observed in the case of soldiers.

3

CUSTODY AND PRODUCTION OF PERSONS CHARGED

1 ULPIAN, *Duties of Proconsul, book 2:* The proconsul normally determines the custody of accused persons, whether someone is to be lodged in prison, handed over to the military, entrusted to sureties, or even on his own recognizances. He normally does this by reference to the nature of the charge brought, the honorable status, or the great wealth, or the harmlessness, or the rank of the accused.

2 PAPINIAN, *Adulteries, book 1:* If a slave be accused on a capital charge, the statute on criminal proceedings provides that bail must be pledged for his appearance either by his master or by another; but if he is not defended, he is required to be thrown into a public prison so as to plead his case in chains. 1. There has, therefore, been frequent discussion of whether a master may subsequently be permitted to put up a surety and have his slave released. The doubt is increased by an edict of Domitian, which provided that the amnesties granted by *senatus consultum* should not apply to slaves of this kind. Indeed, the statute itself forbids a man's release before he has been tried. However, this interpretation is a very harsh one and excessively severe on a slave whose master was away or who because of shortage of means could not at that moment in time put up a surety. Nor can a slave properly be described as abandoned without a defense if he had no master at hand or if he had a master willing to defend him but lacking money. This [concession] may be allowed the more readily if it is not sought after a considerable lapse of time. 2. It is provided by *senatus consultum* that those arraigned to appear in one action are not to have a charge accepted against them in respect of another crime committed at an earlier date. The same principle is observed in private actions and in the case of men under *fideiussio*, unless by this a time-limited action would be put at risk.

3 ULPIAN, *Duties of Proconsul, book 7:* The deified Pius sent a rescript in Greek in reply to a letter from the inhabitants of Antioch to the effect that a person prepared to give sureties should not be put in chains, unless it was agreed that he had committed so serious a crime that he ought not to be entrusted to sureties nor to soldiers, but should suffer this same penalty of imprisonment before his punishment.

4 ULPIAN, *Duties of Proconsul, book 9:* Should anyone who has given surety for one charged fail to produce him, he suffers a money penalty. My own opinion, however, is that if he fails to produce him by connivance, he is also liable to condemnation *extra ordinem*. But if neither the obligation itself nor the governor's decree included a fixed sum, and no custom is declared which provides a set form, the governor shall lay down the quantity of money which must be paid into court.

5 VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* Should the accused confess, he shall be thrown into a public prison until sentence is passed on him.

6 MARCIAN, *Criminal Proceedings, book 2:* The deified Hadrian wrote to Julius Secundus in a rescript, and similar rescripts have been given elsewhere, that credence should certainly not be given to the letters of those who remitted [accused persons] to the governor as if they had already been condemned. The same point was laid down in the case of irenarchs because it was found that not all of them drafted their reports [of criminal interrogations] in good faith. 1. There is indeed extant a chapter of the rules which the deified Pius issued under his edict when he was governor of the province of Asia: that irenarchs, when they had arrested robbers, should question them about their associates and those who harbored them, include their interrogatories in letters, seal them, and send them for the attention of the magistrate. Therefore, those who are sent [to court] with a report [of their interrogation] must be given a hearing from the beginning although they were sent with documentary evidence or even brought in by the irenarchs. The deified Pius and other emperors have written in rescripts to this effect: that even in the case of those who are listed as wanted, if anyone appears to prosecute one [of these], they should not be treated as condemned but as though a charge were being laid afresh. Accordingly, when someone carries out an examination, the irenarch should be ordered to attend and to go through what he wrote. If he does this painstakingly and faithfully, he should be commended; if [he does it] with insufficient skill and not with thorough reasoning, [the judge] simply notes that the irenarch has rendered an inadequate report; but if [the judge] finds that his interrogation was in any way malicious, or that he reported things that were not said as if they had been said, he should impose an exemplary punishment, to prevent anyone else trying anything of the kind afterward.

7 MACER, *Duties of Governor, book 2:* It is customary for the governors of provinces in which an offense has been committed to write to their colleagues [in whose provinces] the perpetrators are alleged to live, requesting that they be returned along with those who are to prosecute them; this also is laid down in a number of rescripts.

8 PAUL, *Military Punishments, sole book:* If the officer in charge of a prison is bribed to keep someone in custody without chains, or has allowed a weapon or poison to be brought into the prison, he must be punished by the court; if he was ignorant of the fact, he should be removed from his post for negligence.

9 VENULEIUS SATURNINUS, *Duties of Proconsul, book 1:* In the case of soldiers, the custom is observed that if they commit any offense, they are handed over to the [commander] under whom they will be serving; and he who takes over an army has also the right of punishing private soldiers.

10 VENULEIUS SATURNINUS, *Duties of Proconsul, book 2:* To prevent anyone who has taken custody of a prisoner from releasing him without cause the rules provide as follows: "If you should establish that any persons kept in fetters have been released by the magistrates hastily and without cause, you shall order them to be bound and shall impose a fine on those who released them. For when magistrates are aware that if they lightly release men from bondage they will bring trouble on their own heads, they will not casually do so in the future."

11 CELSUS, *Digest, book 37:* There is no doubt that whatever be the province of a person produced from custody, he should be judicially examined by the governor of that province in which the action is taking place. 1. By some governors the practice is observed that when [the governor] has examined him and established [the truth], he should dispatch him, together with the written report [of the interrogation], to the governor of his province of origin; this should be done when there is good cause.

12 CALLISTRATUS, *Judicial Examinations, book 5:* If soldiers lose those placed in their custody, they themselves are at risk. For the deified Hadrian wrote a rescript to the legate Statilius Secundus that, whenever a prisoner escapes from military custody, an inquiry should be made into whether he did so because of excessive negligence on the part of the soldiers, or by accident, and whether one escaped out of a larger number, or several at once. Only then should those soldiers whose prisoners have escaped be put to death, if their fault is found very great; otherwise, [punishment] should be inflicted on them in accordance with the degree of their guilt. The same emperor also sent a rescript to Salvius, when legate of Aquitania, that punishment must be imposed on him who has set a prisoner at large or has knowingly kept him in such a way that the prisoner is able to escape; but if it

occurs because of the drunkenness or sloth of the guard, the guard should be corporally punished and transferred to inferior military duties. If, however, he loses [his prisoner] by pure mischance, no punishment should be imposed on him. 1. My view is that if a person escapes from civilian custody, an investigation must be made similar to that which I have mentioned is to be undertaken in the case of soldiers.

13 CALLISTRATUS, *Judicial Examinations, book 6:* On those who, after being lodged in prison, conspire to smash their fetters and break out of jail, punishment is to be imposed over and beyond that due for the offense for which they were lodged as accused; and even though they be found innocent of the charge for which they were flung in jail, yet they should [still] be punished; but those who exposed their conspiracy should receive a lighter penalty.

14 HERENNIUS MODESTINUS, *Punishments, book 4:* Custody of a prisoner should not lightly be given to an inexperienced person; for if the prisoner be lost, the blame rests upon the person who entrusted [the prisoner] to him. 1. The prisoner should be handed over, not to a single person but to two. 2. Those who lose a prisoner by negligence, according to the degree of their fault, are corporally punished or transferred to another branch of the service; but if it was an unimportant prisoner, they are corporally punished and restored [to their rank]. If someone lets a prisoner go out of pity, he is transferred to another branch of the service; but anyone involved in dishonest dealings over the release of a prisoner suffers the capital penalty or is transferred to the lowest rank in the service. Occasionally, pardon is given; thus, when a prisoner had made his escape along with one of the guards, the other guard was pardoned. 3. However, if a prisoner kills himself or throws himself down from a height, this shall be held to be the soldier's fault, that is, he shall be corporally punished. 4. If the guard himself kills his prisoner, he is guilty of homicide. 5. For this reason, if the prisoner is said to have died by accident, this must be proved by the evidence of witnesses, and thus a pardon will be given. 6. Furthermore, it is customary that where a prisoner has escaped by the fault [of his guard], if it is important that he be caught, the soldier is given, on cause shown, time to look for him, and another soldier is attached to him. 7. But Saturninus says approvingly that if anyone loses a runaway slave who is due to be returned to his master, he shall, if he has the means, be ordered to pay the master the price [of the slave].

4

LEX JULIA ON TREASON[1]

1 ULPIAN, *Duties of Proconsul, book 7:* Closest to sacrilege is that crime which is called treason. 1. The crime of treason is that which is committed against the Roman people or against their safety. He is liable, by whose agency a plan is formed with malicious intent to kill hostages without the command of the emperor; or that men armed with weapons or stones should be, or should assemble, within the city against the interests of the state, or should occupy places or temples; or that there should be an assembly or gathering or that men should be called together for seditious purposes; or by whose agency a plan is formed with malicious intent to kill any magistrate of the Roman people, or anyone holding *imperium* or power; or that anyone should bear arms against the state; or who sends a messenger or letters to the enemies of the Roman people, or gives them a password, or does anything with malicious intent whereby the enemies of the Roman people may be helped with his counsel against the state; or who persuades or incites troops to make a sedition or tumult against the state;

2 ULPIAN, *Disputations, book 8:* or who has failed to relinquish his province although his successor has arrived; or who has deserted the army, or, as a private citizen, has fled to the enemy; or has knowingly written or dictated a falsehood onto the public records; for this also is set out in the first chapter of the statute on treason.

3 MARCIAN, *Institutes, book 14:* The *Law of the Twelve Tables* commands capital punishment for the man who stirs up the enemy or hands a Roman citizen over to them. But the *lex Julia* on treason makes him liable who injures the public *majestas*, such as he who sur-

1. *Majestas* is translated regularly as treason, except where it is being contrasted with *perduellio* or means majesty or lèse-majesté.

renders in war or recklessly yields a citadel or camp. Under the same law who, without the command of the emperor, wages war or raises a levy or prepares an army; or who, though he has been superseded in his province, has not handed his military command over to his successor; or who has abandoned his *imperium* or an army of the Roman people; or who, being a private citizen, knowingly and with malicious intent acts as though holding office or magistracy; or who brings about the doing of any of the above;

4 SCAEVOLA, *Rules, book 4:* or he by whose malicious intent a person is induced to take an oath to act against the state; or by whose malicious intent an army of the Roman people is led into an ambush or betrayed to the enemy; or whose malicious action is alleged to have prevented enemies falling into the power of the Roman people; or by whose agency with malicious intent the enemies of the Roman people have been assisted with provisions, arms, weapons, horses, money, or any other thing; or who so acts that allies of the Roman people become their enemies; or by whose malicious intent it is brought about that the king of a foreign nation fails to make submission to the Roman people; or by whose agency with malicious intent it is brought about that hostages, money, or cattle are handed over to the enemies of the Roman people against the interests of the state; also the man who lets go someone charged and found guilty in a [treason] trial and for this reason cast into prison. 1. The senate cleared of this charge a man who had melted down rejected statues of the emperor.

5 MARCIAN, *Rules, book 5:* He who has restored imperial statues which have fallen into disrepair with age does not incur a charge of treason. 1. Nor has someone committed the offense of treason if he happened to hit a statue [of an emperor] with a chance-thrown stone, as Severus and Antoninus wrote in a rescript to Julius Cassianus. 2. The same [emperors] wrote in a rescript to Pontius that there did not seem to be lèse-majesté in selling likenesses of Caesar which had not yet been consecrated.

6 VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* Persons are liable under the *lex Julia* on treason who melt down statues or likenesses of the emperor which are already consecrated, or who commit anything of the same kind.

7 MODESTINUS, *Encyclopaedia, book 12:* The infamous, who do not have the right of accusation, are nevertheless undoubtedly permitted this accusation. 1. Soldiers also, who cannot bring other kinds of actions; for those who are on guard to keep the peace should more and more be permitted this accusation. 2. Slaves also who bring [this] accusation are given a hearing, even against their masters, as are freedmen against their patrons. 3. But this charge should not be treated by judges as an

opportunity for showing their reverence for the imperial majesty, but as a matter of fact; for the nature of the person must be considered; could he have done it, had he done or devised anything beforehand, and was he in his right mind? Nor should a slip of the tongue readily bring a man to punishment; for although thoughtless persons may deserve punishment, nevertheless, they should be pardoned as not of sound mind if their crime was not of such a kind that it derives from the actual wording of the statute or merits exemplary punishment. 4. The offense of treason in an action such as the violation of statues or images is very much aggravated in the case of a soldier.

8 PAPINIAN, *Replies, book 13:* Women also are given a hearing in questions [of offenses] against the *majestas* [of the Roman people]. It was indeed the woman Fulvia who revealed the conspiracy of Sergius Catiline and gave information to the consul M. Tullius [Cicero].

9 HERMOGENIAN, *Epitome of Law, book 5:* The deified Severus decreed that the property of freedmen of those condemned on a charge of treason should be saved for the children of the condemned, and should be claimed for the imperial treasury only if there were no surviving children of the condemned man.

10 HERMOGENIAN, *Epitome of Law, book 6:* He by whose help and counsel, given with malicious intent, a province or a *civitas* has been betrayed to the enemy can be accused of the offense of treason.

11 ULPIAN, *Disputations, book 8:* He who dies while under accusation dies with his status unimpaired; for the charge is extinguished by death. Unless perchance he has been charged with treason; for with this offense his inheritance is claimed by the imperial treasury, unless he is cleared by his successors. Clearly, not everyone charged with treason under the *lex Julia* is on the same footing, but he who is charged with *perduellio*, animated by a hostile spirit against the state or the emperor [is liable even after death]; he who is charged under the *lex Julia* on treason on other grounds is cleared of the charge on his death.

5

LEX JULIA ON PUNISHING ADULTERIES

1 ULPIAN, *Adulteries, book 1:* This law was passed by the deified Augustus.

2 ULPIAN, *Disputations, book 8:* In the *lex Julia* it is laid down that anyone who has to begin with the male adulterer because the woman has married [again] before the notification [of intended prosecution], cannot arrive at [an action against] the woman unless he has completed [the action against] the man. But no one is regarded as having completed an action unless he has obtained a condemnation. 1. This rule deservedly bars someone making an accusation by the right of a husband if he is alleged to have betrayed the [intention of the] statute on the grounds that, having begun on an accusation of adultery, he has dropped it. 2. The crime of *lenocinium* is laid down by the *lex Julia* on adultery, since a penalty is appointed by the statute for the husband who acquires anything from the adultery of his wife and also for him who keeps her after she has been caught in adultery. 3. But he who permits his wife to offend and despises his marriage and who is not angry at the defilement is not inflicted with the punishment for adultery. 4. A person who says he [committed adultery] by the *lenocinium* of the husband is indeed seeking to extenuate his offense, but a set-off of this kind is not admitted. And so if a man accused of adultery wishes to have the husband accused of *lenocinium*, he shall not be given a hearing once he has himself been accused. 5. If in a criminal trial a husband makes an accusation against his wife, should an allegation of *lenocinium* deny the husband his accusation? I would think it

does not; the *lenocinium* of a husband therefore hampers him but does not excuse his wife. 6. From this it can be asked whether he who hears a case of adultery can proceed against the husband for *lenocinium*. And I think he can. For Claudius Gorgus, a man of senatorial rank, who accused his wife, was condemned for *lenocinium* by the deified Severus without any accuser when he was discovered to have kept his wife caught in adultery. 7. But a third party who raises [the issue of] *lenocinium* after he has been accused shall in no way alleviate his own case, nor shall he make the husband liable to a penalty. 8. If the husband and the wife's father come simultaneously to make an accusation, who should be given preference? The better view is that the husband should be preferred; for it is to be believed that he will carry through the accusation with a more intimate anger and a greater grief; so much so that the same is to be said even if the father was the first to come and lodge forms of indictment, provided that the husband was not negligent or delaying, but preparing an accusation and furnishing and providing proofs so that the adultery might be the more easily proved to the judges. 9. But whenever others, who can make an accusation after the husband and the father, hasten forward with an accusation, it is expressly stated in the statute that he who has cognizance of the matter may determine [who is] the proper accuser.

3 ULPIAN, *Adulterers, book 2:* Unless, therefore, the father either proves that the husband is infamous or makes clear that he is rather colluding with his wife than accusing her sincerely, he shall be given place after the husband.

4 ULPIAN, *Disputations, book 8:* If a husband takes precedence and begins an accusation, time [to make an accusation] does not run against the father so as to prevent his bringing one, but until one [of them] first takes action, time runs against both; but where the husband is the first to take action, the remaining time does not run against him who cannot accuse. The same can be said of him who begins either with the adulterer or with the adulteress; for time ceases to run for the accuser against the party, against whom he is not initiating the action. This is the rule for husbands and fathers. 1. But for third parties who can make an accusation the power to accuse is granted [only] after the husband and the father; for after the sixty-day period, four months are allowed to third parties, and these four are *menses utiles*. 2. If a third party has previously instituted an accusation, may an accusation be allowed to a late-coming husband? I think it is better that in this case also the husband should be heard if he was not forestalled through his own negligence. Therefore, even if an accusation has been made by a third party and the woman acquitted, one must still allow the husband to bring the accusation afresh if he can prove good reasons for his being prevented from initiating the accusation.

5 JULIAN, *Digest, book 86:* There is no doubt that a woman married to me can be charged with an adultery committed during a former marriage, since it is explicitly laid down in the *lex Julia* on the punishment of adulteries that if indeed the woman whose adultery is at issue is a widow, the accuser may have a free choice as to whether he prefers to accuse the adulterer or the adulteress first; but if she is married [again] that he should first complete his action against the male adulterer, then the woman.

6 PAPINIAN, *Adulterers, book 1:* The *lex Julia* applies only between free persons who have suffered adultery or *stuprum*. But as far as female slaves are concerned, an action under the *lex Aquilia* will readily apply and that for *injuria* is also competent, nor must the praetorian action for the corruption of a slave be refused; nor shall someone accused of this kind of offense be spared because of the many actions [possible against him]. 1. The law refers to *stuprum* and adultery indiscriminately and with rather a misuse of terms. But properly speaking adultery is committed with a married woman, the name being derived from children conceived by another (*alter*); *stuprum*, however, is committed against a virgin or a widow; the Greeks call it corruption. 2. A husband who is a son-in-power is not distinguished in this law from one who is *sui juris*. The deified Hadrian wrote in a rescript to Rosianus Geminus that a son can charge someone under this law even against the will of his father. 3. Although a husband may [already] have charged two persons with some other offense, he can by his

husband's right accuse a third, since the case [of adultery] is not counted with the others.

7 MARCIAN, *Institutes, book 10:* If a man has married his pupil in contravention of the *senatus consultum* this is not a marriage, and he can be accused of adultery if he was tutor or curator and married, before she was twenty-six years old, a woman not betrothed to him by her father nor destined [as his wife] nor [so] named in her father's will.

8 (7,1) PAPINIAN, *Adulteries, book 2:* MARCIAN notes: A joint charge of incest can be raised against two people at the same time.

9 (8) PAPINIAN, *Adulterers, book 2:* He who knowingly makes available his house for the commission of *stuprum* or adultery with the *mater familias* of another or for homosexual relations with a man, or who makes a profit from the adultery of his own wife, is punished as an adulterer, no matter what his status. 1. It is obvious that by the term "house" any sort of residence is meant.

10 (9) ULPIAN, *Adulteries, book 4:* And if anyone has made available the house of a friend, he is liable. 1. And, indeed, if anyone has provided for the commission of *stuprum* out of doors or in the baths, he ought to be covered [by the statute]. 2. And if men have been accustomed to meet at a certain house to plan an adultery even if nothing was committed at that place, nevertheless the [occupier] seems to have made available his house for the commission of *stuprum* or adultery, because without that specific discussion the adultery would not have been committed.

11 (10) PAPINIAN, *Adulteries, book 2: Mater familias* means not only a married woman but also a widow. 1. Women also are liable under this chapter of the statute insofar as they have made available their house or have accepted something for a blatant *stuprum.* 2. A woman who to avoid the penalty of adultery has become a brothel-keeper or who has hired herself out on the stage can be accused of and condemned for adultery according to the *senatus consultum.*

12 (11) PAPINIAN, *Adulterers, sole book:* A soldier who has come to an agreement with his wife's lover should be released from his oath and deported. 1. It is more correctly said that a soldier who has the daughter of his sister as his concubine is liable to the penalty for adultery even though there is no marriage. 2. A woman who has been listed among those charged with adultery cannot be defended in her absence. 3. After a father-in-law had testified, in a formal complaint presented to the provincial governor, that he would accuse his daughter-in-law of adultery, he preferred to abandon the accusation and rather to seek profit from the dowry. Do you think this kind of scheme should be allowed? The reply was: [It would be] an appalling precedent [if] he who had begun to bring an accusation against his own daughter-in-law afterward preferred to cease [prosecution], being content to retain the profit from the dowry although it was the woman's fault that the marriage had broken up; therefore, it is not unreasonable to refuse him [an action] for the recovery of the dowry, since he did not blush to prefer the advantage of a dowry to the defense of his own house. 4. It is clear that a man charged with adultery can be prosecuted within the five years following the date of the offense being committed, even though the woman is dead. 5. A certain man was wishing to accuse a woman of adultery and made application that the days might not be counted against him which he had spent in custody; while I would allow this, someone came forward to gainsay me. I ask you to write to me pretty quickly whether you would accept his view. The reply was: Both the words and the spirit of the statute support your view which held that *dies utiles* should be reckoned against the accuser, that is, those on which he was able to complete the formalities of an accusation. Therefore, without doubt your view, that the days during which a person was in custody are held to be outside the reckoning of *dies utiles,* ought not to have been contested. 6. It is certain that the sixty days which are reckoned as *dies utiles* to an accusing husband are counted including holidays, provided the accuser had the opportunity of approaching the governor, since a document laying the accusation can be handed in outside the court. But if [the husband] has lost this privilege he is not

prevented from laying his complaint before a judge within a further four months. 7. Could a man make an accusation with the right of a husband against a woman who, after being betrothed to him, had been given in marriage to another by her father? The reply was: I think it would be a novelty to create an accuser of this kind, who seeks to lay a charge of adultery on account of the mere fact that a girl formerly betrothed to him has been given in marriage to another by her father. 8. A woman who is after the death of her husband alleged guilty of adultery, 9. wishes to obtain an adjournment from her accuser for the sake of her infant son; ought she to be heard? I replied: The woman does not seem to me to have recourse to a justified defense if she puts forward the age of her son in order to escape a legitimate accusation; for anyway the charge of adultery which is laid against the woman does not prejudice the boy, since it is possible for her to be an adulteress and for the boy [still] to have had the dead man as his father. 10. I wish to allege guilty of adultery a woman who has continued in her marriage after the commission of the offense, but this is denied me. Is this a correct reply? The reply was: You ought not to have been ignorant of the fact that, as long as the marriage in which the adultery is said to have been committed endures, the woman cannot be charged with adultery; neither can the male adulterer be accused for the time being. 11. Although a woman may be alleged to have married a man who has fallen under suspicion of adultery [with her], she cannot be accused before he is convicted of adultery; otherwise, perhaps [first] husbands will very often resort to this expedient when they wish to break up a harmonious second marriage by saying that the woman had contracted marriage with her adulterous [lover]. 12. A woman, after she had heard that her absent husband had died, married another man; not long after, her husband returned. What steps should be taken against that woman? The reply was that the question raised was not so much one of law as of fact; for if a long time had elapsed without evidence of any *stuprum* [on her part] and she, led by false reports [into believing] that she was free from the earlier bond, contracted a lawful second marriage, the likelihood is that she was [genuinely] deceived, and there can appear to be nothing deserving punishment. But if the supposed death of her husband shall be proved to have provided an excuse for getting married, [then] since [her] action is offensive to chastity, she ought to be punished in accordance with the nature of the offense committed. 13. I have married a woman charged with adultery; I have divorced her as soon as she was convicted. Am I regarded as having provided the grounds for the divorce? The reply was: Since, in accordance with the *lex Julia*, you are forbidden to keep a wife of this kind, it is clear that you are not to be regarded as having provided the grounds for the divorce. For this reason then, the question of right shall be treated as though the divorce had been brought about because of the fault of the woman.

13 (12) ULPIAN, *Adulteries, book 1:* The words of the statute "let no one hereafter knowingly and with malicious intent commit *stuprum* or adultery" apply both to him who counsels *stuprum* or adultery and to him who brings it about.

14 (13) ULPIAN, *Adulterers, book 2:* If a woman caught in adultery is not a wife but was a concubine [her man] cannot accuse her with a husband's right for she was not a wife, but he is not forbidden to institute an accusation by the right of a third party, provided that she was someone, as, for example, one who was her patron's concubine, who did not lose the name of matron by giving herself in concubinage. 1. Clearly, a husband can bring an accusation whether his wife is party to a *jus civile* or a *jus gentium* marriage; for, as Sextus Caecilius says, this law applies to all marriages and he cites that line from Homer: For not only, it runs, the sons of Atreus love their wives. "Not alone of articulate men do the sons of Atreus love their wives." 2. Indeed, a husband can vindicate his right for adultery in a wife who is a prostitute even though, were she a widow, *stuprum* might be committed with her without penalty. 3. The deified Severus and Antoninus wrote in a rescript that this same [offense] is punishable even in the case of a fiancée, because it is not permissible to violate either a marriage, of whatever sort, nor [yet] an expectation of marriage. 4. If, however, she should be a woman with whom incest has been committed or one who, though she has the disposi-

tion to be a wife, is not able to be a wife [through some impediment], it must be stated that she cannot be accused by a husband's right but she can by the right of a third party. 5. A judge [in a case] of adultery ought to keep before his eyes and to inquire into whether the husband by his own chaste life was also setting his wife an example of cultivating sound morals; for it appears the height of injustice that a husband should demand of his wife a purity which he does not show himself; this is something which can condemn the husband also, that the pair of them did not come to an agreement for the balancing out of their mutual offenses. 6. Should a person wish to accuse his own wife and state that she has committed adultery before she married him, he cannot institute an accusation under his husband's right because she did not commit the adultery when she was married to him. This can also be said of a concubine whom a man has subsequently married, or of a daughter-in-power whose father has subsequently consented to her union. 7. If anyone should prove clearly that his wife committed adultery when she was in enemy hands, it will be said as a concession that he can make the accusation by a husband's right; but the husband will be able to claim [satisfaction] for adultery only if she was not subjected to violence by the enemy; if, however, a woman is subject to violence, there are no grounds for her to be condemned for adultery or *stuprum.* 8. If a girl below the age of twelve who has formally been given in marriage commits adultery and not long after at [her husband's] house passes that age and begins to be a wife, she cannot, as a married woman, be accused under a husband's right on account of the adultery which she committed before [she came of] age, but she can be accused as if betrothed, under the rescript of the deified Severus which is set out above. 9. If a [wife] has been repudiated and then taken back [by her husband], not as it were within the span of the same marriage but as though another had taken place in between, we have to see whether she can be accused of the offense which she committed in the previous marriage. I think that she cannot; for [the husband] canceled the offenses of the previous marriage by marrying her again. 10. The same has to be said if someone should wish to accuse of *stuprum* the woman whom he subsequently married; for it is too late for him to impugn the [woman's] morals which he has endorsed by marrying her.

15 (14) SCAEVOLA, *Rules, book 4:* He by whose aid and counsel, with malicious intent, it is brought about that a man or woman caught in adultery should buy themselves off with money or any other agreement, is condemned to the same punishment as is laid down for those condemned on a charge of *lenocinium.* 1. If a husband, in order to blacken his wife's good name, suborns an adulterer so that he himself can catch [them in the act], both husband and wife are liable to a charge of adultery under the *senatus consultum* made on this subject. 2. It is permitted to a husband first of all, or [after him] to a father who has a daughter-in-power, to make an accusation within sixty days of the divorce, and no one else is granted the power of bringing an action in that period; outside those days, regard is not paid to the wishes of either of them. 3. Those who bring accusations under a husband's right do not thereby avoid the risk of calumny.

16 (15) ULPIAN, *Adulteries, book 2:* If a husband should be holding a magistracy, it is possible for the [woman's] father to take precedence over him [in lodging an accusation]; not but what he should not. Pomponius also thinks that it should be stated that so long as the husband is holding the magistracy, the father's right to bring an accusation should also be held up, to prevent the husband's right, which is equal with that [of the father], being taken away from him; therefore, the father's sixty days will not run since he cannot bring an accusation. 1. In chapter seven of the *lex Julia* on adulteries it is provided as follows: "No one is to put on the list of persons charged someone who, without [the intention of] evasion, is absent at the time on public business"; for it did not appear just that a person absent on public business should be listed among those charged so long as he is working for the state. 2. The words "without [the intention of] evasion" are a necessary addition; but if someone has arranged to be absent on public business for the purpose of avoiding a charge, his scheme is to avail him nothing. 3. If, however, someone is physically present and yet is [normally] treated

as if he were absent (as for example someone who is serving in the *vigiles* or the urban cohorts), it should be stated that he can be accused; for he does not have to take [undue] pains to put in an appearance. 4. It is also to be stated as a general rule that the absence is excused of those persons only who are absent on state business in a province other than the one in which they are accused. In the same way, if a person commits adultery in the province in which he holds office, he can be accused [there], unless his status is such that it is not subject to the governor's jurisdiction. 5. If the husband and the father state before the sixty days are up that they are not going to bring an accusation, does time immediately begin to run for a third party? Pomponius was the first to think that a third party could be allowed to bring an accusation immediately they state that they are not [bringing one]. I think that one must agree with him; for it can be said with even greater weight that a person who has stated that he will not be bringing an action ought not thereafter to be given a hearing. 6. The *lex Julia* on adulteries expressly prohibits certain persons from bringing an accusation of adultery, such as someone below the age of twenty-five; for a person who is not yet of full age is not seen as a suitable accuser. This is true only if he is not pursuing an injury to his own marriage; but if he wishes to avenge his own marriage, although he may be proceeding to [make] the accusation by a third party's right, yet he is to be given a hearing; for no such limitation should be placed in the way of someone avenging his own injury. True, if he was led by youthful heedlessness, or fired by a young man's passion, into leaping into an accusation, the penalty for calumny will not readily be invoked against him as accuser. We take someone who is in the twenty-fifth year of his age as being below the age of twenty-five. 7. Those limitations which are customarily brought as objections to persons bringing accusations of adultery must as a matter of course be dealt with before anyone can be included among the persons charged; but when someone has once been included, he cannot plead a limitation. 8. If a woman continues in her widowhood, it is at the discretion of the accuser whether he wishes to begin with the male or the female party to the adultery. 9. If anyone has accused an adulterer and an adulteress at the same time, he achieves nothing and can, as if he had not accused either of them, make a fresh start with which one he wishes, because he has not achieved anything by his first accusation.

17 (16) ULPIAN, *Adulteries, book 1:* A man who has sent a repudiation to his wife can subsequently accuse her to prevent her marrying Seius and, if he accuses her, [can] begin with her.

18 (17) ULPIAN, *Lex Julia on Adulteries, book 2:* How do we take it that an accusation has been made, to a judge or just simply? I myself think that it is enough if someone intimates that he is going to bring a prosecution for adultery, even if he has not done so before a judge. 1. What, then, if he has not in fact made an [open] accusation but submitted documents of accusation before [the woman in question] married and she, although she had learned of this, married [anyway], or even [married] in ignorance [of the accusation]? I think that notification [of an accusation] does not seem to be served on her; and for that reason it is not possible for the accuser to begin with her. 2. What, then, if he has accused her only to prevent her marrying, but has failed to add the grounds; is she not to be regarded as having rightfully married? It is better, however, to follow [the principle] that his accusation of her seems to reserve to the accuser, who has brought the charge, the right of choice. By all means, therefore, if [the accuser] has made a reference to the crime of adultery in his accusation, even if he has not indicated [the evidence] to the judge, we think with better reason that the woman can be accused, just as if a [proper] accusation had gone beforehand. 3. But what if there is specifically included in the accusation the person with whom she committed adultery, and then he wishes to accuse her [of adultery] with another person? The better view is that he ought not to be given a hearing; for he is not putting forward the charge which he announced. 4. Again, if a person has issued a notification by means of a procurator, I think that he can, if he wishes, institute the accusation, and that the procurator's notification is sufficient. 5. Therefore, also if he makes the notification by means of agents, that is, [where] a master makes the notification by means of a slave, his notification will be ratified. 6. Can one person accuse the adulteress and another the adulterer, so that, although they cannot both be accused simultaneously by the same person, they can separately [be accused] by different persons? It is, however, consistent to agree

that different accusers can be allowed, with the proviso that if the woman marries before the notification, she cannot be accused first. Therefore, the woman will await the passing of sentence on the male adulterer; if he is acquitted, the woman will win her case through him and cannot be accused further; if he is condemned, the woman is not thereby condemned but will conduct her own action so that perhaps she may be able to win it by favor or by the justice [of her case] or by the help of the statute. For what if the male adulterer, after having been beset with enmities or incriminated before the governor by false evidence and suborned witnesses, was unwilling or unable to appeal, while the woman, having drawn a principled judge, is going to make a defense of her modesty? 7. But if, before being condemned

19 (18) MACER, *Criminal Proceedings, book 1:* or before the action against him is begun,

20 (19) ULPIAN, *Lex Julia on Adulterers, book 2:* the male adulterer dies, it is also laid down that on his death the woman can be accused without bar to the accusation. 1. If, however, it was not death but the penalty for some other offense that removed the man charged, we still say that it is possible to come at the woman. 2. If, at the time when he was charged, the female adulterer was not married, but when he is acquitted she is found to be married, it must be stated that even after the male adulterer's acquittal, it is possible for her to be accused, because, at the time he was charged with adultery, she was not married. 3. A married woman cannot be accused, not only [not] by the person who accused the male adulterer unsuccessfully but also not by anyone else, if the male adulterer was acquitted. In the same way, if by collusion [the accuser] comes to an agreement with the male adulterer and [the latter] is acquitted, he has given the married woman immunity from all [accusers]. Clearly, if she ceases to be married, she can be accused; for the statute does not protect anyone other than a married woman for as long as she is married.

21 (20) PAPINIAN, *Adulteries, book 1:* A father is granted the right of killing an adulterer along with a daughter whom he has in power; no other [class of] father may lawfully do this, including a father who is a son-in-power.

22 (21) ULPIAN, *Adulterers, book 1:* (Thus, it may happen that neither a father nor a grandfather may be able to kill), nor is this unreasonable; for a man does not seem to have [anyone] in his own power if he does not have power over himself.

23 (22) PAPINIAN, *Adulterers, book 1:* In this statute, a natural is not distinguished from an adoptive father. 1. A father does not have a special right of accusation over a daughter who is a widow. 2. The right to kill is granted to the father in his own house, even if his daughter does not live there, or in the house of his son-in-law; the term "house" is to be taken as meaning "domicile," as in the *lex Cornelia* on *injuria*. 3. However, a person who has the power to kill an adulterer is all the more able lawfully to inflict rough treatment on him. 4. The reason why it is the father not the husband who is allowed to kill the woman and any adulterer [caught with her] is that, for the most part, the concern for family duty implicit in the title of father takes counsel for his children; but the heat and impetuosity of a husband [too] readily jumping to a decision should be restrained.

24 (23) ULPIAN, *Adulteries, book 1:* The words of the statute "shall have caught the adulterer in his daughter" do not appear to be otiose; for the intention was that this power should be available to the father if and only if he should catch his daughter actually engaged in the crime of adultery. Labeo also approves [this interpretation], and Pomponius has written that a person caught in the actual act of love is killed. This also is what Solon and Draco say: ἐν ἔργῳ "in the act". 1. It is enough for the father if he has [his daughter] in power at the time when he kills her, not at that when he gave her in marriage; suppose here that she was subsequently taken back into power. 2. The reason why the father is not allowed to kill his daughter wherever he catches her, but only in his own house or in that of his son-in-law, is said to be that the legislator thought it a more serious outrage for her to dare to bring an adulterer into the house of her father or her husband. 3. But if the father should live elsewhere and yet has another house in which he does not live, then, if his daughter is caught [in the house] where he does not live, he cannot kill her. 4. The words of the statute "may kill his daughter without delay" are to be taken in this sense; that he may not, after killing the male adulterer today, spare his daughter and then kill her some days later, or vice versa; for he must kill both of them almost with the one blow and the one onset, possessed by an equal anger against both. If, however, he has failed to achieve this and

his daughter makes her escape while he is killing the male adulterer, only to be caught some hours later by her father who has been pursuing her, he will be regarded as having killed [her] without delay.

25 (24) MACER, *Criminal Proceedings, book 1:* A husband also is permitted to kill his wife's adulterer, but not, as the father is, whoever it may be; for it is provided by this statute that a husband is permitted to kill a man whom he catches in adultery with his wife in his own house (not also [in that] of his father-in-law) if the [paramour] is a pimp or if he was previously an actor or performed on the stage as a dancer or singer or if he has been condemned in criminal proceedings and is not yet restored to his former status, or if he is a freedman of the husband or wife or of the father, mother, son, or daughter of either of them (and it is of no consequence whether he was the sole property of one of them or was owned jointly with someone else) or if he is a slave. 1. It is also laid down that a husband who kills any of these is to divorce his wife without delay. 2. But it has been stated by the majority of [jurists] that it does not matter whether the husband is *sui juris* or a son-in-power. 3. The question is asked, as regards both of them [father and husband], in terms of the sense of the statute: Is the father permitted to kill a magistrate? Again, if the daughter is of bad reputation or the wife was married contrary to the statutes, do the father and the husband nonetheless have their right [to kill her]? And what if the father or the husband is a pimp or branded with some disgrace? It will be more correct to say that [only] those who can bring an accusation under a father's or husband's right have the right to kill.

26 (25) ULPIAN, *Lex Julia on Adulterers, book 2:* In the fifth chapter of the *lex Julia*, the following is laid down: that a husband, who has caught in his wife an adulterer whom he either does not wish or is not permitted to kill, may lawfully and with immunity detain him for a continuous period not exceeding twenty hours, by day and by night, for the purpose of testifying to the matter. 1. My own view is that what is expressly laid down for a husband should also apply to a father. 2. Even if a husband apprehends [the adulterer] elsewhere than in his own house, he can detain him. 3. But once let go, the adulterer cannot be brought back. 4. What, therefore, if he escapes; can he be brought back and guarded for twenty hours? And I think it may rightly be said that once brought back, he can be kept for the purpose of testifying to the matter. 5. The addition of "for the purpose of testifying to the matter" has this effect, that it may lead witnesses to be available to give testimony for the accuser that the man charged was taken in adultery.

27 (26) ULPIAN, *Disputations, book 3:* So long as her marriage lasts, a wife cannot be accused of adultery by those persons, apart from her husband, who are allowed to make an accusation; for no third party should upset and disturb a wife approved by her husband and a peaceful marriage, unless he shall first have accused the husband of *lenocinium.* 1. But it is competent for an accusation abandoned by the husband to be revived by another.

28 (27) ULPIAN, *Adulteries, book 3:* If an accuser demands that an interrogation [under torture] be made of a slave accused of adultery, whether he himself has wished to be present or not, the judges [shall] order that slave to be valued, and when they have valued him, they shall order the man who has named the slave in his accusation to convey to him to whom this matter pertains as much money [as the slave is worth] and as much again. 1. But let us consider to whom that penalty should be paid, because the statute named him as "to whom this matter pertains." Therefore, we shall rightly state that a bona fide buyer, although he bought from one who was not the owner, is the man "to whom this matter pertains." 2. And we all the more agree that the pledge creditor is also in the same position; for he indeed had an interest that the slave should not be put to the question. 3. And if someone else has a usufruct in a slave, the estimated value should be divided between him and the owner. 4. If a slave is common to several masters, then by all means must the estimated value be divided between them. 5. If a freeman, while he is thought a slave, has been tortured because he himself did not know his own status, Caecilius prefers to grant him an *actio utilis* against the man who assailed him by calumny, so that his calumny in bringing a freeman to torture as though he were a slave should not go unpunished. 6. The statute orders that the male or female slaves of a man or woman who is the subject of a criminal investigation, or of the parent of either of them, should be put to the torture, if those slaves were given by the parents for the use of [the accused]. However, the deified

Hadrian wrote in a rescript to Cornelius Latinianus that torture may [also] be applied to slaves outside the household. 7. There are ordered to be present at the interrogation the accused person, male or female, their patrons, and the person bringing the accusation, and the patrons are granted the opportunity of putting questions. 8. The prevailing view is that interrogation under torture may also be applied to a slave in whom the person charged had a usufruct; for granted that he was not "his" slave, he still appears to have been in his service; and what is relevant to the interrogation is not the issue of ownership but that of employment. 9. Therefore, if someone else's slave is serving the person charged in good faith, one will agree that he can be interrogated under torture. 10. Again, if there should be a slave to whom freedom is due by a *fideicommissum* or is hoped for by disposition [in a will], the prevailing view is that he can [still] be tortured. 11. The statute orders that those men to whom torture has been applied in this manner should [thereafter] be *publici servi*; similarly, with [a slave] in common ownership we confiscate one share; with a slave in single ownership, of whom a third party has a usufruct, [we confiscate] the bare ownership; while as regards one in whom the person charged had only a usufruct, the prevailing view is that the taking of the usufruct should begin to belong to the state; we shall definitely not confiscate a slave belonging to a third party. The reason then for making the slaves public property is so that they may speak the truth without any intimidation and may not, fearing that they are going to return to the power of those accused, be obdurate under torture. 12. They are not, though, confiscated until the torture has been applied to them. 13. But even if they deny [the charge], they are nonetheless confiscated; for the reason is still the same, that they should not, while hoping to return to the power of their [former] masters, persist in telling lies in the hope that a reward will be bestowed on them. 14. The accuser's slaves also, if torture has been applied to them, are confiscated; for it is right that his slaves also leave his ownership, lest they should tell lies. The slaves of third parties, however, do not have anyone whom they can gratify [by lying, and are therefore not confiscated]. 15. If the person charged, male or female, is acquitted, the intention of the statute was that his or her loss should be assessed by the judges; and if [the slaves] have died, [it shall be established] how much money they were worth before the torture, or if they are alive how much money the damage done to them costs or [how much money] the gain [from them] would have been. 16. Attention should be paid to what is provided in chapter nine [of the statute] if a slave be accused of adultery and the accuser wishes torture to be applied to him; the statute [in general] requires double his value to be paid to the master, but in this case only the single [amount].

29 (28) MARCIAN, *Criminal Proceedings, book 1:* What is owing from these cases is claimed by *condictio*, which is founded on statute.

30 (29) ULPIAN, *Adulteries, book 4:* The statute has punished the *lenocinium* of a husband who after catching his wife in adultery has kept her and let the adulterer go; for he ought to have avenged himself on the man and also vented his rage on his wife, who has violated their marriage. The circumstances in which the husband is to be punished are when he cannot defend his ignorance [of the adultery] or cloak his forbearance with the pretext of disbelief; for this reason, then, the words of the statute are "[who] lets go an adulterer caught in his house," because its intention is to punish the husband who catches [the adulterer] in his actual wrongdoing. 1. Let us see whether what the statute says, that anyone who marries a woman condemned for adultery is liable under the statute, applies also to *stuprum*; this is the better view. Certainly, if she has been condemned under that statute on some other count, a wife may be married with impunity. 2. He also is punished who takes a bribe [to conceal] a *stuprum* which he has discovered, nor does it make any difference whether he who takes it is the husband or someone else; for whoever takes anything on account of his knowledge of a *stuprum* is liable to be punished. However, if anyone lets [an offender] go without payment, he does not fall under the statute. 3. Anyone who makes a profit out of his wife's adultery is punished; for it is no small crime to have pimped for one's wife. 4. A [husband] is seen as having made a profit out of his wife's adultery if he has accepted anything in return for her committing adultery; and he is not to be exempt [from punishment] according to whether he accepted something on a number of occasions or only once; for a man is rightly to be regarded as having made a profit out of

his wife's adultery if he has accepted anything in return for allowing his wife to commit adultery in the manner of a whore. If, however, he should allow his wife to go astray, not for profit but out of negligence or carelessness or a degree of forbearance or excessive credulity, his position seems to be outside [the scope of] the statute. 5. Six months is the dividing period [for an accusation], so that, in the case of a married woman, the six months are reckoned from the day of her divorce, in that of a widow, from the day the offense was committed; this meaning appears from a rescript sent to the consuls Tertullus and Maximus. Moreover, if it be sixty days since the date of the divorce but a five-year period has elapsed since the commission of the offense, it must be said that the woman cannot be accused; so that the granting of the six *menses utiles* must be taken in the sense that an offense which has been asleep for a continuous period of five years may not be awakened. 6. The legislator intended this five-year period to be observed if an accused person, male or female, faces a charge of *stuprum*, adultery, or *lenocinium*. What, then, if it be another charge deriving from the *lex Julia* which he or she faces, as do those who have made their house available for the purpose of *stuprum*, or others of the same kind? It is better to say that the five-year period is fixed for all offenses arising under the *lex Julia*. 7. The five-year period is to be taken as [beginning] from that day on which the offense was committed, and as [running] to that day on which the man or woman concerned is accused, not to that on which judgment on the adulteries is given. 8. It is added at more length in the *senatus consultum* that if a number of persons are accusing the same man, the initial date of the accusation is necessarily that of the person who [persists] in bringing a charge against the man or woman, that is to say, that the accuser looks to his own documents of accusation, not to those of someone else. 9. There is, however, no doubt that a person who has forcibly committed *stuprum* on either a male or a female can be accused without limit of time, since it is indubitable that he is committing *vis publica*.

31 (30) PAUL, *Adulteries, book 1:* A father cannot bring an action without risk of calumny. 1. The sixty days are counted from [the date of] the divorce; the sixtieth day itself is included within the sixty.

32 (31) PAUL, *Adulteries, book 2:* The five-year period is not [made up] of *dies utiles* but is reckoned continuously. What, then, is to happen if the woman has been charged first and the male adulterer cannot therefore be charged at the same time, and the case is prolonged to the point where the five-year limit is exceeded? What if a person who had brought an accusation against another within the five-year period has failed to carry it through or has prevaricated and a second [accuser] wishes to resume the action against the same accused, and the five-year period is up? The equitable course is for that time which was consumed by the previous accusation to be excluded from the five-year period.

33 (32) MACER, *Criminal Proceedings, book 1:* It does not matter whether a father kills his adulterous daughter first or not, so long as he kills both of them; for if he kills [only] one of them, he will be charged under the *lex Cornelia*. If, however, while one has been killed, the other is [only] wounded, he is not exempted according to the words of the statute; but the deified Marcus and Commodus wrote in a rescript that he should be allowed to go unpunished because, although after the killing of her lover the woman survived such very serious injuries inflicted on her by her father, she was preserved more by fate than by his intention, because the law demands an equal anger and requires an equal severity against [both] those who have been caught. 1. Once a husband has chosen one of the adulterers [to accuse], he cannot accuse the other until the earlier trial be concluded, because two persons cannot lawfully be accused simultaneously by the same man. However, the accuser is not forbidden to accuse, along with the male or female adulterer, the person also who provided his house [for the act] or gave counsel so that the offense might be bought off.

34 (33) MARCIAN, *Criminal Proceedings, book 1:* The deified Pius wrote in a rescript that if anyone states that a slave of his own has committed adultery with her who was his wife, he ought rather to accuse the woman than to torture his slave as a preliminary to an action against her. 1. If anyone does not let go an adulterer but keeps him [by him], as it might be a son [caught] with his stepmother or a freedman or a slave with his wife, he is punished

according to the spirit of the law, even though by its letter [the adulterer] who is retained is not covered. Again, if a [husband] remarries a [wife] dismissed [the house], he is not liable under the words [of the statute], but it must be said that he is to be liable to avoid the possibility of fraud. 2. If a wife accepts a bribe for the adultery of her husband, she is liable under the *lex Julia* as though she were an adulteress.

35 (34) MODESTINUS, *Rules, book 1: Stuprum* is committed by someone who keeps a free-woman for the sake of sexual relations not marriage, unless indeed she is a concubine. 1. Adultery is committed with a married woman; *stuprum* is committed with a widow, a virgin, or a boy.

36 (35) MODESTINUS, *Rules, book 8:* If a person who is about to bring an accusation of adultery makes an error in relation to the indictment, [then] if time permits, he is allowed to correct it to avoid the case falling.

37 (36) PAPINIAN, *Questions, book 3:* If a person below the age of majority commits adultery, he is liable under the *lex Julia*, because [the ability to commit] a crime of this nature begins from puberty.

38 (37) PAPINIAN, *Questions, book 5:* It is laid down that a son-in-power can, without the consent of his father, bring criminal proceedings against his wife for adultery; for he is pursuing satisfaction for his own personal distress.

39 (38) PAPINIAN, *Questions, book 36:* If adultery be committed along with incest, as, for example, [by a man] with his stepdaughter, daughter-in-law, or stepmother, the woman also will suffer a similar punishment; for this would happen even were [the element of] adultery to be removed. 1. If *stuprum* be committed on a sister's daughter, it has to be considered whether the penalty for adultery is enough for the woman. It happens that a dual crime is committed in this case; for it makes a great difference whether a marriage is unlawfully contracted by mistake or whether contempt for the law and defilement of blood ties concur; but we rather consider that a mistake in law on this point also should tell in the woman's favor. 2. A woman, therefore, will suffer the same penalty as males [do] only in that case where she has committed an act of incest forbidden by the *jus gentium*; for if it is only the observance of our own law [the *jus civile*] that is at issue, the woman will be excused from the charge of incest. 3. Sometimes, however, even in the case of males, charges of incest, although they are naturally more serious, are by custom treated more leniently than [those of] adultery, provided only that the incest was incurred by way of an unlawful marriage. 4. Indeed, the brother emperors remitted the charge of incest against Claudia on account of her age but ordered the illegal union to be broken up, although in other cases the crime of adultery, committed at puberty, is not excused by [reason of] age. For it has been stated above that women who are mistaken in law are not liable to a charge of incest, although they can have no defense to an adultery which they have committed. 5. The same emperors wrote in a rescript that after a divorce, [following a marriage] which a stepson had made in good faith with his stepmother, a charge of incest should not be allowed. 6. The same [emperors] sent a rescript to Pollio in these words: "Incestuous marriages are normally not confirmed but are excused; and accordingly we remit the penalty of his past offense to anyone who abstains [from sexual activity] in such a marriage, if he has not yet been charged." 7. But incest which is committed by way of an illicit marital union is customarily excused on the grounds of sex or age, or even of a making good undertaken in good faith by the person liable to punishment, at any rate if a mistake is alleged; and this [is allowed] the more easily if no one has brought a charge. 8. The Emperor Marcus Aurelius and his son Commodus wrote in a rescript: "If a husband, led on by the rush of his grief, kills his wife whom he has caught in adultery, he will not at any rate receive the penalty of the *lex Cornelia* on murderers." And the deified Pius sent a rescript in these words to Apollonius: "It is possible to remit the aggravated death penalty to a man who does not deny that he killed his wife whom he had caught in adultery, since it is extremely difficult to temper one's just grief, and he is to be punished because he did more [than he should have done] rather than because he ought not to have avenged himself. It will be enough, therefore, if he be of low rank, for him to be handed over to forced labor in perpetuity or, if of higher status, to be relegated to an island." 9. A freedman is not readily allowed to assail his patron's reputation; but if he seeks to accuse him of adultery under a husband's right,

he is to be permitted to do so in the same way as if he had suffered a very serious *injuria*. It certainly must be weighed carefully whether he can, after surprising his patron in adultery with his wife, kill him with impunity if [the latter] falls within that class who may be killed when surprised by another. This seems harsh to us; for if the [patron's] reputation should be spared, so much more should his life. 10. If anyone holds any honor or public office, he may indeed be charged [with adultery], but the accusation against him is postponed, and he promises security for appearing in court at the end of his term of office. Tiberius Caesar wrote in a rescript to this effect.

40 (39) PAPINIAN, *Replies, book 15:* It was contained in a sentence [passed by] a provincial governor that a woman had suffered violence; I replied that she had not committed [an offense] against the *lex Julia* on adulteries, although she forbade her injury to be reported immediately to her husband for the sake of protecting her modesty. 1. Again, in the case of a married woman, even though her husband has not first been accused of *lenocinium*, it is possible for a charge of adultery to be brought against her lover by a third party. 2. Again, in the case of marriage, a husband, after the death of his wife, may lawfully require her lover to be listed among those charged. 3. A married woman is not charged with adultery before the male adulterer is condemned, unless, before the second marriage, the notification was sent either to the judge or to the woman's house. 4. I gave an opinion that it was possible [for a husband] to keep in marriage without fear of punishment a wife ordered into exile for association with brigands, because she had not been condemned for adultery. 5. A charge of incest combined with adultery is not excluded by the five-year time limit. 6. It is agreed that two persons, male and female, cannot lawfully be accused simultaneously of a joint offense of adultery, [not even] by the husband. However, when two persons had been accused by someone who afterward wished to drop the charges, I replied that annulment of the accusation was necessary against each of them. 7. A joint charge of incest can be brought against two persons simultaneously. 8. I replied that interrogation under torture should be applied to slaves in respect of an accusation of incest against their masters if and only if the incest were said to have been committed in the course of an adulterous relationship.

41 (40) PAUL, *Replies, book 19:* Can a woman, whose husband has threatened to accuse her on a charge of adultery but has taken no action either under his husband's right or under criminal law, marry the man whom he has named as guilty of adultery with her? Paul replied that there was nothing to prevent the woman who was the subject of the inquiry from marrying the man whom her husband held suspect. 1. Again, if the same husband remarries the same wife, can he be regarded as having abandoned his accusation or having committed *lenocinium*? Paul replied that someone who, after threatening a charge of adultery, has remarried the same wife, is seen as having abandoned [the accusation] and therefore under the same statute his right of bringing an accusation against her subsequently does not survive.

42 (41) PAUL, *Views, book 1:* In a charge of adultery no adjournment should be granted except for the production of the parties or [if] the judge, influenced by the nature of the business, permits this *causa cognita*.

43 (42) TRYPHONINUS, *Disputations, book 2:* If a person who has obtained the *jus anulorum* has committed adultery with his patron's wife or with his patroness, or with the wife of the father, or the mother, or with the wife of the son, or the daughter, of him whose freedman he was, ought he to be punished as a freedman? And if he be caught in the act of adultery can he be killed with impunity? I rather favor the view that he should be liable to the punishment of freedmen, because in the *lex Julia* on the punishment of adulteries it was agreed for the preservation of marriages that [such persons] should be treated as freedmen and it is not right that the position of patrons should be worse on account of the benefit [of the *jus anulorum*].

44 (43) GAIUS, *XII Tables, book 3:* If a repudiation was not sent in accordance with the statute and for that reason a woman should seem still to be married, yet if a man marries her [thereafter], he will not be an adulterer. And so Salvius Julian replied, because, he said, adultery is not committed without malicious intent; although it must be said that a man who knows that she has not been legally divorced must not break the law with malicious intent.

45 (44) PAPINIAN, *Replies, book 4:* Again, on the death of a mother-in-law, her son-in-law may be charged with incest, as an adulterer [can be] after the death of the woman.

6

LEX JULIA ON *VIS PUBLICA*

1 MARCIAN, *Institutes, book 14:* A man is liable under the *lex Julia* on *vis publica* on the grounds that he collects arms or weapons at his home or on his farm or at his country house beyond those customary for hunting or for a journey by land or sea.

2 SCAEVOLA, *Rules, book 4:* But those arms are excepted which someone has by way of trade or which come to him by inheritance.

3 MARCIAN, *Institutes, book 14:* Under the same heading come those who have entered into a conspiracy to raise a mob or a sedition or who keep either slaves or freemen under arms. 1. A man is also liable under the same statute if, being of full age, he appears in public with a missile weapon. 2. Under the same heading come those who, assembling seditiously in the most wicked manner, attack country houses and seize property with missile and hand weapons. 3. Also liable is the man who seizes anything from a fire, excepting building materials. 4. Furthermore, anyone who forcibly violates a boy or a woman or any other person is punished by the penalty of this statute. 5. Anyone who has been present at a fire with a sword or missile weapon for the purpose of robbery or of preventing the owner from rescuing his property is liable to the same penalty. 6. Also liable under this statute is anyone who with armed men expels someone having possession from his home, his farm, or his ship, or attacks him,

4 ULPIAN, *Edict, book 59:* or lends men for this purpose.

5 MARCIAN, *Institutes, book 14:* Also liable is anyone who in a gathering, assembly, mob, or sedition commits arson; or anyone who with malicious intent shuts a person up or besieges him; anyone who does anything to prevent a burial, to plunder or frustrate a funeral; or anyone who puts another under an obligation to him by force; for the law voids such an obligation. 1. If the matter at issue concerns both *vis* and possession or ownership, the deified Pius sent a rescript in Greek to the community of Thessaly that the question of *vis* should be investigated before that of the ownership of the thing; and he decreed also that the complaint concerning *vis* should be laid before that concerning the right of ownership or possession. 2. Anyone who has raped a single or married woman is punished by the extreme penalty, and even if the woman's father, moved by entreaties, forgives the injury done to him, yet a third party may still charge the guilty man outside the five-year limit, since the crime of rape exceeds the scope of the *lex Julia* on adulterers.

6 ULPIAN, *Duties of Proconsul, book 7:* The deified Pius also wrote in a rescript that the person who forcibly abducted a freeborn boy was to be punished in these words: "I have ordered that there should be submitted a copy of the written charge given to me by Domitius Silvanus in the name of his uncle, Domitius Silvanus, having been moved by his complaint in which he indicated that his freeborn son, while still a boy, had been abducted and imprisoned, then flogged and tortured to the most severe

danger [of his life]; my dearest Geminus, I would wish you to give him a hearing and, if you find these things have been thus committed, to pursue the matter with severity."

7 ULPIAN, *Duties of Proconsul, book 8:* Also liable under the *lex Julia* on *vis publica* is anyone who, while holding *imperium* or office, puts to death or flogs a Roman citizen contrary to his [right of] appeal or orders any of the aforementioned things to be done, or puts [a yoke] on his neck so that he may be tortured. Again, so far as relates to ambassadors, pleaders, or those who accompany them, anyone who is proved to have beaten or done them an injury.

8 MAECIAN, *Criminal Proceedings, book 5:* It is provided in the *lex Julia* on *vis publica* that no one is to bind or hinder an accused so as to prevent his attending at Rome within the fixed period.

9 PAUL, *Edict, book 7:* We should understand the term "armed men" as meaning those who have not only weapons but also anything else which can inflict damage.

10 ULPIAN, *Edict, book 68:* Anyone who does something with malicious intent to hinder the safe exercise of justice or to hinder judges in the proper giving of judgment, or [to hinder] anyone holding office or power from giving decrees or orders or from acting as he has the right to do; anyone who by means of *injuria* extorts from someone against his will a promise in public or in private to give games or money; also anyone who with malicious intent is present with a weapon at an assembly or a place where judgment is to be given publicly. An exception is made for anyone who is allowed, for the purpose of hunting, to have men [equipped] to fight with wild beasts, and to have attendants for those purposes. 1. Also liable under this statute is he who after summoning men together commits *vis*, whereby someone is flogged or beaten, even if nobody is killed. 2. A person found guilty of *vis publica* is interdicted from fire and water.

11 PAUL, *Views, book 5:* Those who loot, break open, or storm the homes or country houses of others, if, indeed, they gathered an armed mob, receive capital punishment. 1. In the term "weapons" all objects from which injury can result to a man's health are included. 2. Persons who bear weapons for the purpose of protecting their own safety are not regarded as carrying them for the purpose of homicide.

12 PAUL, *Senatus Consultum Turpillianum, sole book:* Those who impose new taxes are liable under the *lex Julia* on *vis publica.*

7

LEX JULIA ON *VIS PRIVATA*

1 MARCIAN, *Institutes, book 14:* Under the *lex Julia,* one third of the property of anyone condemned for *vis privata* is to be confiscated, and it is laid down that he may not be a senator or decurion, nor hold any office, nor sit in that *ordo,* nor be a judge; and by *senatus consultum* he shall be deprived undoubtedly of all office as though

infamous. 1. The same penalty is inflicted on those who fall under the penalty of the *lex Julia* on *vis privata*, as also on anyone who with malicious intent seizes anything from a shipwreck. 2. In addition, however, in accordance with the imperial constitutions, those who steal anything from shipwrecks are punished *extra ordinem*; for the deified Pius wrote in a rescript that there must be no *vis* shown to sailors and that if anyone does so, he should be punished most severely.

2 SCAEVOLA, *Rules, book 4:* Anyone who, after summoning men together, commits *vis* resulting in anyone's being flogged or beaten, [even if] nobody is killed, is liable under this statute.

3 MACER, *Criminal [Proceedings], book 1:* Nor does it matter whether those he summoned together for the purpose of causing *vis* were freemen or slaves and, [if the latter], his own or another's. 1. Those who have been thus summoned together are no less liable under the same statute. 2. Even if none has been summoned together and none beaten, yet something has wrongfully been taken from another's property, the man who did this is liable under this statute.

4 PAUL, *Edict, book 55:* An offense is committed under the *lex Julia* on *vis privata* when anyone is alleged to have raised a mob or a gathering to prevent someone's being brought to court. 1. Again, if anyone has had another man's slave put to the torture; [although this matter hardly calls for a public criminal trial, and], therefore, Labeo says that one should with more discretion make use of the praetor's edict on *injuria*.

5 ULPIAN, *Edict, book 69:* If [the owner] drives a man off his land with an unarmed mob, he may be charged with *vis privata*.

6 MODESTINUS, *Rules, book 8:* In accordance with the *senatus consultum Volusianum*, persons are liable under the *lex Julia* on *vis privata* who dishonestly combine in a third party's action with the intention of sharing out between them whatever shall be recovered for his property after his [opponent's] condemnation.

7 CALLISTRATUS, *Judicial Examinations, book 5:* If creditors proceed against their debtors, they should claim what they reckon is owed to them through the agency of a judge; otherwise, if they enter upon the debtor's property without anyone's permission, the deified Marcus decreed that they should not have creditors' rights. The words of the decree are as follows: "It is best that, if you think you have claims, you should pursue them by actions at law; meantime the other party should remain in possession, you are the claimant." And although Marcian said, "I have done no *vis*," Caesar said: "Do you think that *vis* occurs only if men are wounded? It occurs whenever anyone demands what he thinks is owed to him otherwise than through the agency of a judge. But I do not think it consonant with your modesty, dignity, or compassion to do something without right. Whoever then shall be proved to me to have taken possession, recklessly and without resort to a judge, of any property of a debtor which has not been handed over to him by the debtor, and to have said that he had a right over that property, shall not have creditor's rights."

8 MODESTINUS, *Punishments, book 2:* If a creditor without the authority of a judge occupies the property of a debtor, he is liable under this law, and is fined one third of his property and becomes infamous.

8

LEX CORNELIA ON MURDERERS AND POISONERS

1 MARCIAN, *Institutes, book 14:* Under the *lex Cornelia* on murderers and poisoners, someone is liable who kills any man or by whose malicious intent a fire is set; or who goes about with a weapon for the purpose of homicide or a theft; or who, being a magistrate or presiding over a criminal trial, arranged for someone to give false evidence

so that an innocent man may be entrapped [and] condemned. 1. He also is liable who makes up [and] administers poison for the purpose of killing a man; or who with malicious intent gives false evidence so that someone may be condemned in criminal proceedings for a capital offense; or who, being a magistrate or judge of a [jury] court in a capital case, takes a bribe so that [the accused] may be found guilty under criminal law. 2. Whoever kills a man is punished without distinction as to the status of the man he killed. 3. The deified Hadrian wrote in a rescript that he who kills a man, if he committed this act without the intention of causing death, could be acquitted; and he who did not kill a man but wounded him with the intention of killing ought to be found guilty of homicide. On this account, it should be laid down that if someone draws his sword or strikes with a weapon, he undoubtedly did so with the intention of causing death; but if he struck someone with a key or a saucepan in the course of a brawl, although he strikes [the blow] with iron, yet it was not with the intention of killing.[2] From this it is deduced that he who has killed a man in a brawl by accident rather than design should suffer a lighter penalty. 4. Again, the deified Hadrian wrote in a rescript that he who kills someone forcibly making a sexual assault on him or a member of his family should be discharged. 5. The deified Pius wrote that a lighter penalty should be imposed on him who killed his wife caught in adultery, and ordered that a person of low rank should be exiled permanently, but that one of any standing should be relegated for a set period.

2 ULPIAN, *Adulterers, book 1:* A father cannot kill his son without giving him a hearing but must accuse him before the prefect or the provincial governor.

3 MARCIAN, *Institutes, book 14:* Under chapter five of the same *lex Cornelia* on murderers and poisoners, someone is punished who makes, sells, or possesses a drug for the purpose of homicide. 1. The person who sells baneful potions to the public or possesses them for the purpose of homicide is liable to the penalty of the same statute. 2. The addition of the phrase "baneful drugs" indicates that there are certain drugs which are not baneful. The term is therefore neutral, covering as much a drug prepared for the purpose of healing as one for the purpose of killing, as also that which is called an aphrodisiac. However, only that [kind of drug] is mentioned in the statute which is possessed for the purpose of homicide. It is, however, ordered by *senatus consultum* that a woman who, not admittedly maliciously but inadvisedly, has administered a fertility drug from which the recipient dies shall be relegated. 3. It is laid down by another *senatus consultum* that dealers in cosmetics are liable to the penalty of this law if they recklessly hand over to anyone hemlock, salamander, monkshood, pinegrubs, or a venomous beetle, mandragora, or, except for the purpose of purification, Spanish fly. 4. Again, he is liable whose *familia*, with his knowledge, takes up arms with the intention of acquiring or recovering possession; also he who instigates a sedition; and he who conceals a shipwreck; and he who produces, or is responsible for the production of, false evidence for the entrapment of an innocent person; again, any-

2. *Collatio* (1, 6, 2–4) quotes ULPIAN, *Duties of Proconsul, book 7*, for another version of Hadrian's rescript: "He who has killed a man is customarily acquitted, that is if he did it without the intention of killing, and he who has not killed but sought to kill is condemned as a murderer. It is therefore to be laid down on this ground—was it with iron that Epaphroditas struck the blow? For if he drew a sword or struck with a weapon, what doubt is there that he struck with the intention of killing? If, however, he struck with a key or a saucepan, or [even] struck with iron in the course of a chance brawl, but without design to kill [he should be acquitted]. Therefore, find this out and, if there was an intention to kill, order the slave to be put to the extreme penalty as a murderer, in accordance with the law."

one who castrates a man for lust or for gain is by *senatus consultum* subject to the penalty of the *lex Cornelia.* 5. The penalty of the *lex Cornelia* on murderers and poisoners is deportation to an island and the forfeiture of all property. However, nowadays capital punishment is customary, except for persons of a status too high to be subject to the [modern] statutory punishment; those of lower rank are usually either crucified or thrown to the beasts while their betters are deported to an island. 6. It is lawful to kill deserters to the enemy wherever they are met with, as though they were enemies.

4 ULPIAN, *Duties of Proconsul, book 7:* Under the *lex Cornelia* on murderers anyone is liable who, while holding a magistracy, takes any action not permitted by statute concerning the death of a man. 1. When someone had caused a death for sport, the deified Hadrian confirmed the action of Ignatius Taurinus, governor of Baetica, in relegating him for a five-year period. 2. The same deified Hadrian wrote in a rescript: "It is laid down, in order to end the practice of making eunuchs, that those who are found guilty of this crime are to be liable to the penalty of the *lex Cornelia,* and their goods must deservedly be forfeit to my imperial treasury. Slaves, however, who castrate others are to be punished with the extreme penalty. If those who are liable on this charge fail to appear in court, sentence is to be pronounced in their absence as if they were liable under the *lex Cornelia.* It is certain that if those who have suffered this outrage announce the fact, the provincial governor must give those who have lost their manhood a hearing; for no one should castrate another, freeman or slave, willing or unwilling, nor should anyone voluntarily offer himself for castration. Should anyone act in defiance of my edict, the doctor performing the operation shall suffer a capital penalty, as shall anyone who voluntarily offered himself for surgery."

5 PAUL, *Duties of Proconsul, book 2:* Under the constitution of the deified Hadrian to Ninnius Hasta, those too who crush the testicles of others are in the same position as those who castrate them [with a knife].

6 VENULEIUS SATURNINUS, *Duties of Proconsul, book 1:* It is provided by a *senatus consultum* given in the consulship of Neratius Priscus and Annius Verus that whoever hands his slave over for castration is fined half his property.

7 PAUL, *Criminal Proceedings, sole book:* Under the *lex Cornelia,* guilty intention is presumed from the deed. But, under this law, gross negligence is not interpreted as guilty intention. Accordingly, if someone throws himself from a height and lands on another, killing him, or a pruner when throwing down a branch from a tree fails to shout a warning and kills a passer-by, punishment under this statute is not applicable.

8 ULPIAN, *Edict, book 33:* If it is proved that a woman has done violence to her womb to bring about an abortion, the provincial governor shall send her into exile.

9 ULPIAN, *Edict, book 37:* If anyone kills a thief by night, he shall do so unpunished if and only if he could not have spared the man['s life] without risk to his own.

10 ULPIAN, *Edict, book 18:* If anyone with malicious intent sets fire to my block of flats, he shall suffer the capital penalty as an arsonist.

11 MODESTINUS, *Rules, book 6:* By a rescript of the deified Pius it is allowed only to Jews to circumcise their own sons; a person not of that religion who does so suffers the penalty of one carrying out a castration. 1. If a slave be thrown to the beasts without [having been before] a judge, not only he who sold him but also he who bought him shall be liable to punishment. 2. Following the *lex Petronia* and the *senatus consulta* relating to it, masters have lost the power of handing over at their own discretion their slaves to fight with the beasts; but after the slave has been produced before a judge, if his master's complaint is just, he shall in this case be handed over to punishment.

12 MODESTINUS, *Rules, book 8:* An infant or a madman who kills a man is not liable under the *lex Cornelia*, the one being protected by the innocence of his intent, the other excused by the misfortune of his condition.

13 MODESTINUS, *Encyclopaedia, book 12:* By *senatus consultum* the man who performs or organizes evil sacrifices is ordered to be condemned to the penalty of this statute.

14 CALLISTRATUS, *Judicial Examinations, book 6:* The deified Hadrian wrote a rescript in the following words: "In crimes it is the intention, not the issue, to which regard is paid."

15 ULPIAN, *Lex Julia et Papia, book 8:* It makes no difference whether someone kills or provides the occasion of death.

16 MODESTINUS, *Punishments, book 3:* Those who have committed murder of their own free will and with malicious intent, if they hold office are normally deported; if they are of inferior station, they suffer the capital penalty. This can more readily be done in the case of decurions, but in such a way that [capital punishment] takes place [only] when the emperor has first been consulted and orders it [to be carried out], unless perchance a disorder could not otherwise be quietened down.

17 PAUL, *Views, book 5:* If a man dies after being struck in a brawl, one must have regard to the blows delivered by each of those who gathered together for the purpose.[3]

9

LEX POMPEIA ON PARRICIDES

1 MARCIAN, *Institutes, book 14:* By the *lex Pompeia* on parricides it is laid down that anyone who kills his father, mother, grandfather, grandmother, brother, sister, first cousin on the father's side, first cousin on the mother's side, paternal or maternal uncle, paternal [or maternal] aunt, first cousin (male or female) by mother's sister, wife, husband, father-in-law, son-in-law, mother-in-law, [daughter-in-law], stepfather, stepson, stepdaughter, patron or patroness, or with malicious intent brings this about, shall be liable to the same penalty as that of the *lex Cornelia* on murderers. And a mother who kills her son or daughter suffers the penalty of the same statute, as does a grandfather who kills a grandson; and in addition, a person who buys poison to give to his father, even though he is unable to administer it.

2 SCAEVOLA, *Rules, book 4:* The brother [of a parricide], who had knowledge only [not proof] and did not warn his father, was relegated, and the doctor [who supplied the drug] was put to death.

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3. *Collatio* [1, 7, 2] offers a variant: "But if a man dies after being struck in a brawl, because one must also have regard to the blows themselves struck against each man who took part, therefore those of low rank are condemned to the games or the mines, those of high status are fined half their property and relegated."

3 MARCIAN, *Institutes, book 14:* It must be known that first cousins are included under the *lex Pompeia,* but that others of an equal or closer degree of kindred are not similarly covered. Stepmothers and betrothed persons are left out, but are covered by the spirit of the law,

4 MARCIAN, *Criminal Proceedings, book 1:* since the father and mother of the betrothed, male or female, are contained in the term "fathers-in-law" as are those engaged to one's children in the term "sons-in-law."

5 MARCIAN, *Institutes, book 14:* It is said that when a certain man had killed in the course of a hunt his son, who had been committing adultery with his stepmother, the deified Hadrian deported him to an island [because he acted] more [like] a brigand in killing him than as [one] with a father's right; for paternal power ought to depend on compassion, not cruelty.

6 ULPIAN, *Duties of Proconsul, book 8:* Should [only] those who kill their parents be liable to the penalty for parricide, or their accomplices also? Maecian says that the accomplices also are liable to the same penalty, and not the parricides alone. Hence, accomplices, even if outside the family, are liable to the same penalty.

7 ULPIAN, *Edict, book 29:* If, with the knowledge of a creditor, money is furnished for the commission of a crime, say for the procuring of poison or for payment to bandits or assailants for the killing of a father, he who seeks [to borrow] the money and he who thus lends it, or [he] by whom it is promised, shall [all] be liable to the penalty for parricide.

8 ULPIAN, *Disputations, book 8:* If someone who has been accused of parricide dies in the meantime, then if he brought about his own death, the imperial treasury must be his heir; otherwise, provided he made a will, [the heir shall] be that person whom he wished; or if he died intestate, he shall have as heirs those called by law.

9 MODESTINUS, *Encyclopaedia, book 12:* According to the custom of our ancestors, the punishment instituted for parricide was as follows: A parricide is flogged with blood-colored rods, then sewn up in a sack with a dog, a dunghill cock, a viper, and a monkey; then the sack is thrown into the depths of the sea. This is the procedure if the sea is close at hand; otherwise, he is thrown to the beasts, according to the constitution of the deified Hadrian. 1. Those who kill persons other than their mother, father, grandfather, or grandmother (who, as we have said above, are punished in the traditional way) shall be punished capitally or put to the extreme penalty. Truly, if anyone kills a parent in a fit of madness, he shall not be punished, as the deified brothers wrote in a rescript in the case of a man who had killed his mother in a fit of madness; for it was enough for him to be punished by the madness itself, and he must be guarded the more carefully, or even confined with chains.

10 PAUL, *Penalties under All the Laws, sole book:* An accusation is always allowed against those who can be liable to the penalty for parricide.

10

LEX CORNELIA ON FALSEHOODS AND THE *SENATUS CONSULTUM LIBONIANUM*

1 MARCIAN, *Institutes, book 14:* The penalty of the *lex Cornelia* is imposed on a person who with malicious intent conspires for the giving of false witness or the delivering one after another of false evidence. 1. Again, he who takes money for furnishing

advocacy or evidence or makes an agreement [or] forms a conspiracy to ensnare the innocent is punished under the *senatus consultum.* 2. Also if anyone takes money for renouncing or withdrawing evidence or for giving or withholding [evidence], he is subject to the penalty of the *lex Cornelia.* So also is [the person] who corrupts, or provides for the corruption of, a judge. 3. Also if a judge neglects the imperial constitutions, he is punished. 4. Those who make a false entry or remove an item from accounts, registers, wax tablets, or any other such thing without the affixing of a seal are for just these reasons punished precisely as if they were forgers. Thus, also the deified Severus condemned the prefect of Egypt under the *lex Cornelia* on forgery, because he made a false entry in his records while he was in charge of the province. 5. A person who opens the will of someone who is still alive is liable to the penalty of the *lex Cornelia.* 6. A person who alleges that another with whom he lodged documents has betrayed them to his adversaries can accuse him of forgery. 7. The *senatus consultum* applies to the wills of soldiers, whereby those who write in a legacy or *fideicommissum* for themselves are liable under the *lex Cornelia.* 8. There is this difference between a son, a slave, and a person outside the family when writing out a will, that in the case of the outside person the penalty ceases to apply, and [the legacy] may be taken, if a specific signed clause is added "which I have dictated to him and have confirmed," while with the son or the slave a signed clause in general terms is sufficient to avoid the penalty and enable [the legacy] to be taken. 9. A man is liable to the penalty for forgery for this reason also (as the deified Severus and Antoninus also laid down), so that tutors and curators and those who have laid down this duty but have not restored [to the pupil or ward] their tutory or curatory cannot come to an agreement with the imperial treasury, and if anyone contrary to this law cheats the prefects or the state treasury he is punished in exactly the same manner as if he had committed a forgery. 10. This does not, however, apply (as those same emperors wrote in a rescript) to those who have done such acts before taking up a tutory; for [the emperors] have not accepted their excuses but have barred [accusations of] fraud. 11. The same emperors wrote in a rescript that a man who has not yet rendered the

accounts of his tutory or curatory must not come to an agreement with the imperial treasury only if the person whose tutory he has been administering is alive; for if he has died, it is lawful for him to come to such an agreement, even if he has not yet rendered his accounts to the heir. 12. But if a tutor or curator has succeeded by right of inheritance to an agreement with the imperial treasury, even before the accounts are rendered, I do not think that there is any scope for a penalty, even if the person whose tutory or curatory was being administered is still alive. 13. The penalty for forgery or its equivalent is deportation and confiscation of all property; and if a slave commits any of these [offenses], it is ordered that he suffer the extreme penalty.

2 PAUL, *Sabinus, book 3:* A person who steals, hides, takes away, destroys, partially erases, substitutes, or unseals a will, or with malicious intent writes, seals, or recites a false will, or by whose malicious intent this is done, is condemned to the penalty of the *lex Cornelia.*

3 ULPIAN, *Disputations, book 4:* A person who, not knowing a will to be false, has either entered upon an inheritance or accepted a legacy, or in some way or other acknowledged it, is not debarred from declaring the will to be false.

4 ULPIAN, *Disputations, book 8:* If someone dies after arranging for a legacy to him to be written falsely into a will, [the property] is to be wrested from [his] heir as well. Thence also the deified Marcus thought that when a certain man, who had been instituted heir by his father, died after cutting out some codicils, the imperial treasury should have a claim on only so much as could be disposed of by those codicils, that is, up to three quarters [of the estate].

5 JULIAN, *Digest, book 86:* The senate remitted the penalty to a person who had, by codicils written in his own hand, taken back legacies conveyed by him under a will, because he had done this at the command of his father and was [less than] twenty-five years of age; he was also allowed to take his inheritance.

6 AFRICANUS, *Questions, book 3:* If anyone writes in a legacy for himself, he is liable to the penalty of the *lex Cornelia,* even though the legacy is invalid; for it is also agreed that he is liable if he writes a legacy to himself into a will albeit that it is subsequently broken, or even was invalid from the beginning. But this then is true when the will is in due form. But if [the will] has not been sealed, the prevailing view is that there is no scope for the *senatus consultum,* just as there is no scope for an interdict for the production of a will; for there to be scope for the *senatus consultum* there must first be some kind of a will, even if not one lawfully made. For what is correctly called a forged will is only one which, had it not been spurious but true, would properly be called a will. Similarly, therefore, a will described as not lawfully made is one which, had everything been done according to rule, would be called lawfully made. 1. If a person instituted as heir writes a disherison by name of a son or any other persons, he is liable under the *senatus consultum.* 2. Similarly, a person who in his own hand withdraws the liberty granted to a slave of the testator, and particularly from one to whom legacies or *fideicommissa* had been conveyed by himself, is liable under the *senatus consultum.* 3. If a patron writes a legacy to himself into the will of a freedman and, after having obtained pardon, has been ordered to refrain from taking the legacy, should he be able to have the advantage of *bonorum possessio contra tabulas?* The better view is that he cannot. However, it does not follow from this, if a wife writes in her dowry or a creditor the amount owing to him on the appointed day, and they likewise obtain pardon and are ordered to refrain from taking the legacy, that either the wife's action for her dowry or the creditor's action [for his debt] should be denied, lest either of them should be deprived of what is justly owed.

7 MARCIAN, *Institutes, book 2:* Slaves can in no way bring actions against their masters, since they are reckoned as altogether unable to raise actions in the *jus civile* most surely, and also not in praetorian law nor in *cognito* proceedings; except for [the

case] of which as a concession the deified Marcus and Commodus wrote in a rescript, when a slave was making a complaint that the tablets of a will, in which he had been granted his freedom, were suppressed, that he should be allowed to bring an accusation concerning the suppression of the will.

8 ULPIAN, *Duties of Proconsul, book 7:* Persons who on the one hand shave down gold coins or on the other wash [with gilt] or cast [other coins], if they are freemen should be thrown to the beasts, if slaves, sentenced to the extreme penalty.

9 ULPIAN, *Duties of Proconsul, book 8:* It is provided by the *lex Cornelia* that someone who adds base metal to gold or who casts counterfeit silver coins is liable for the crime of forgery. 1. The same penalty is also imposed on a person who, although having the power to forbid such an action, did not forbid it. 2. The same statute expressly lays down that no person should with malicious intent seek to buy or sell coins made of tin or lead. 3. The penalty of the *lex Cornelia* is visited on him who knowingly and with malicious intent seals or arranges for the sealing of something other than a will, and also [on those] who with malicious intent conspire for the giving of false witness or the delivering one after another of false evidence. 4. A person who has suborned an accuser to appear in a case involving money is liable to the same penalty as those who have taken money for instigating lawsuits.

10 MACER, *Criminal [Proceedings], book 1:* No provision is made in the *senatus consulta* for a person who writes something in [to a will] for the person in whose power he is, or for someone else in the same power; but in this event also it is an offense under the law, because the benefit of the act goes to the father or master to whom it would apply if the son or slave had written in for himself. 1. This point is agreed: that if anyone writes in a legacy to a person outside the family though later, during the testator's lifetime, he comes to have him in his power, there is no place for the *senatus consulta.*

11 MARCIAN, *Criminal Proceedings, book 1:* If a father whose son-in-power is a soldier writes a [legacy] for that son into the will of a fellow soldier with whom [the son] has become acquainted through his military service, then because [the legacy] is not acquired by the father, the matter falls outside the penalty [of the *lex Cornelia*]. And the deified brothers wrote in a rescript, when a son had written in a [legacy] to his mother that when he had written at the command of the testator, he should be unpunished and his mother could take the legacy.

12 PAPINIAN, *Replies, book 13:* When a person guilty of forgery dies before the charge is brought in, or before sentence is pronounced, while the *lex Cornelia* ceases to apply, that which he obtained by his crime is not left to his heir.

13 PAPINIAN, *Replies, book 15:* To lay claim to a false *nomen* or *cognomen* is punished by the penalty for fraud. 1. I gave the opinion that an advocate, who had been removed from the order of decurions for ten years for reading out a forged document when the governor was presiding over the court, recovered his station at the end of that period because, having read a forgery, but not concocted it, he did not fall under the *lex Cornelia.* By the same argument, [my opinion was that] a plebeian punished for the same reason by temporary exile can properly be made a decurion after his return.

14 PAUL, *Questions, book 22:* When an emancipated son was writing his father's will, he wrote in at his father's order a legacy to a slave owned jointly by Titius and himself; I ask how this question should be resolved. He gave as an opinion: You have joined a number of questions together. Indeed, so far as the *senatus consultum* is concerned, by which we are forbidden to write in a legacy for ourselves or those whom we have in our power, an emancipated son also is liable to the same penalty, even although he

wrote at his father's order; for the person who does seem to be excused is he who is in power, such as a slave, provided however that the order appears [confirmed] by the testator's signature; for such I have found was the senate's intention. 1. The next question is whether, since it is agreed that what has been written illegally is as if it had not been written, [the legacy] that was written in for the slave owned jointly by the writer and another should be regarded as not written in its entirety, or only as far as it relates to the writer but the whole is due to the co-owner. I found that Marcellus had commented on Julian; for since Julian had written that if the man had written [a legacy] for Titius and himself or for their joint slave, since what he wrote for himself was held as though not written, it can very readily be ascertained how much is acquired by Titius and [another] co-owner in this way. Marcellus himself added: How will anything be due to the co-owner if the name of the slave is removed as if it were forged? And this should be considered in the present instance. 2. A husband manumitted a dotal slave and wrote a legacy to himself into the [latter's] will. The question was asked: What can the wife recover under the *lex Julia*? I gave as an opinion: It must be said that a patron falls under the penalty of the edict of the deified Claudius, as [did] an emancipated son, notwithstanding that if passed over [in the will] they can seek *bonorum possessio*. Therefore, if the patron receives nothing from his freedman's property, he will not be liable to his wife. Can he then be liable under the additional provision in the *lex* [*Julia*] "or does something fraudulently to prevent its coming to him?" However, he did nothing to defraud his wife; for his scheme was not against her. Do we not then refuse him the actions [to claim a legacy], since he is liable to make restitution to another? But when a man, who wrote in a legacy to himself at the order of the testator, also made a *fideicommissum* to himself, likewise at the bidding of the testator, [asking him] to restore something to another, the senate nonetheless ordered that he should refrain from taking the legacy, and that it, with the burden of the *fideicommissum*, should remain with the heir.

15 CALLISTRATUS, *Questions, book 1:* The deified Claudius ordered in an edict that there should be added to the *lex Cornelia* that anyone who, in writing another's will or codicils, writes in a legacy to himself in his own hand is then liable just as if he had offended against the *lex Cornelia*, nor should he be pardoned if he alleges that he had not known of the stringency of the edict. However, writing in a legacy for himself seems to cover not only the person who does it in his own hand but also him who is granted a legacy by the agency of his own slave or his son-in-power at the dictation of the testator. 1. It is expressly provided in the imperial constitutions that if the testator has specifically attested with his signature that he has dictated to a person's slave that his master is to be given a legacy by the heirs, this is valid; but that a general signature of the testator is not valid against the authority of the *senatus consultum*, and accordingly, the legacy is to be treated as if it had not been written, and pardon granted to the slave who actually wrote in a legacy to himself. For myself I think that it is safer to apply for pardon from the emperor, refraining of course from the legacy meantime. 2. Again, the senate held that if a slave at his master's order writes his own freedom into a will or codicils, on account of its being written with his own hand, he should not be free but that his freedom is assured on the grounds of a *fideicommissum*, provided only that after the writing [of that manumission] the testator signed

his will or codicils with his own hand. 3. And insofar as the *senatus consultum* covered only this one aspect of freedom by *fideicommissum*, the deified Pius wrote in a rescript that one should follow the spirit rather than the letter of this *senatus consultum*; for slaves, when obeying their masters, are excused by the constraint of the power [to which they are subject], provided that the master's authority is added by a signed clause that he has dictated and confirmed these matters; for, [the emperor] says, what was written at the wish of the master is treated as if written in his own hand. "This [principle], however," he says, "ought not to be extended to freemen over whom the testator has no legal power; but you must ask whether they are similarly under a duty to comply and whether there is not an honorable excuse for their doing what is not permitted." 4. Again, a mother whose son dictated a legacy to her at the hand of her slave was held to be entitled to a pardon under the *lex Cornelia*. 5. The senate was of the same view in the case of a daughter who, at her mother's dictation and in ignorance of the law, had written a legacy to herself. 6. If anyone, after instituting two heirs, adds that if one or other of them dies without issue, the inheritance shall pass to him who survives and has children, or if both die childless, the inheritance (and from here on in another hand) shall revert to the writer of the will, it has been resolved that the person drawing up the will shall be spared the penalty of the *lex Cornelia*. But it is more charitable that he should acquire in a similar way those things also which are set out above.

16 PAUL, *Replies, book 3:* He gave as an opinion that the offense of pilfering legal documents was not one for criminal proceedings unless it was proved that it was someone's will that had been stolen. 1. Paul gave the opinion that all those persons who had sealed documents even other than wills with forged wax were liable to the penalty of the *lex Cornelia*. 2. There is, however, no doubt that the same penalty is customarily applied to those others who have made a false entry in account books, tablets, public records, or any other such thing without the affixing of a seal, or have hidden, filched, destroyed, substituted, or unsealed anything so that the truth may not be revealed.

17 PAUL, *Fideicommissa, book 3:* When someone had written in, in his own hand, a slave as a legacy to himself and had been asked to manumit him, the senate held that all the heirs should manumit him.

18 PAUL, *Views, book 3:* We are not forbidden to write a legacy to our wife into another person's will. 1. A person who has written himself into a will as tutor to the testator's infant son, although he is presumed to be suspect, because he appears to be striving to obtain a tutory of his own accord, may, if he is shown to be suitable, still be appointed as tutor not by the will, but by the decree [of a magistrate]. Nor shall his defense be accepted that he appears to have complied with the wish of the testator.

19 PAUL, *Views, book 5:* Persons who strike false coinage, if they did not intend a complete likeness, are forgiven where they have shown evidence of a proper repentance. 1. An accusation of substitution of a child is never cut off by prescription of time, nor does it matter even if the woman alleged to have substituted the child has died.

20 HERMOGENIAN, *Epitome of Law, book 6:* These are punished by the penalty for forgery: those who take money for furnishing a lawsuit with advocacy or evidence; those who make a contract or agreement; those who enter into a conspiracy; or those who act to bring about any of those things.

21 PAUL, *Senatus Consultum Turpillianum, sole book:* Anyone who sells the same thing as a complete whole by separate contracts to two persons is punished by the penalty for forgery, as was laid down by the deified Hadrian. There is added also the

person who corrupts a judge. However, they are usually punished fairly lightly by relegation for a finite period without confiscation of property.

22 PAUL, *Senatus Consultum Libonianum, sole book:* It must be said that a person under the age of puberty does not fall under this edict, since he can hardly be liable to a charge of forgery when malicious intent does not occur at that age. 1. If a father writes into [another's will] a legacy to a son who is in enemy hands, on that son's return he is held to be liable to the penalty of the *senatus consultum;* but if the son dies there, the father is held to be guiltless. 2. However, if he writes in [a legacy] to an emancipated son, his action will be proper; and similarly, to a son he has given in adoption. 3. Again, if he writes in [a legacy] for a slave, to whom he had delayed in granting liberty under a *fideicommissum,* he must be held to be outside the tenor of the *senatus consultum,* since it is agreed that everything which has been acquired by the agency of a slave of this kind ought to be returned to him when he is manumitted. 4. Also if he writes in something to a slave serving as such in good faith, although guilty as regards his intentions because he wrote it in for one whom he believed to be his own property yet, because neither a legacy nor an inheritance is acquired for a bona fide *possessor,* we hold that he should be exempt from the penalty. 5. If a master writes in a legacy to a slave for when he shall be free, we hold that the master is exempt from the *senatus consultum* because he is in no way looking to his own advantage. And the same can be said of a son afterward emancipated. 6. A person who confirms codicils made before a will, in which [codicils] a legacy had been written in to him, falls under the *senatus consultum;* and so Julian writes. 7. Also by taking something away, a person must be liable to the penalty, just as if he had given himself something: for example, if he takes away with his own hand the freedom of a slave left to him as a legacy and manumitted by the same [testator] (that is, if he takes it away at the wish of the testator; if [the testator] is unaware, the [gift of] freedom holds good), or again, if, after being asked to restore a legacy written in to himself, he cuts out a *fideicommissum.* 8. A person who writes in with his own hand the assignation of a freedman['s services] to himself is liable, not under the letter but under the spirit of the *senatus consultum.* 9. Again, the wording does not cover the slave who inserts his own freedom as a *fideicommissum* in another's will. There can, however, be no doubt about this since, as we have said above, the senate has only remitted the penalty to a person who has written in a *fideicommissum* of liberty to himself in his master's will if the master signed it. Certainly, it must be said that he contravenes the *senatus consultum* to a greater extent than one who writes in a legacy to himself, since liberty will in every way belong to him alone, but a legacy can be acquired by his master. 10. If the person drawing up a will gives freedom by *fideicommissum* to his slave, let us see whether he is not outside the scope of the penalty, since it brings him no advantage, unless he writes in that the slave is to be redeemed from him for a large sum and manumitted. 11. However, the person who, when a farm was left as a legacy to Titius, added in his own hand the condition that the money should be given to himself, falls under the spirit of the *senatus consultum.* 12. But he who, at his father's wish, disinherits himself or strikes out a legacy to himself is not covered either by the words or by the spirit of the *senatus consultum.*

23 PAUL, *Punishments for Civilians, sole book:* What is forgery? It appears to be [forgery] if someone imitates another's handwriting, or tampers with, or copies a written document or accounts, but not [when] someone in his reckoning or accounting commits other types of misstatement.

24 SCAEVOLA, *Digest, book 22:* Aithales, a slave, to whom had been left by *fideicommissum* in the will of Betitus Callinicus his freedom and a share of the inheritance, [to be granted] by those appointed heirs to the [remaining] eleven parts of the estate, gave evidence to Maximilla, daughter of the testator and appointed heiress to one twelfth, that he could prove Betitus Callinicus's will to be a forgery. Having been interrogated by Maximilla in the presence of the magistrates, he declared that he would prove how the will had been falsified. And when Maximilla had brought a charge of forgery against the writer of the will and Proculus, a co-heir, the urban prefect after

the case had been heard declared that the will was not forged and ordered that Maximilla's twelfth should be taken by the imperial treasury. The question was raised: After this had taken place, had Aithales a right to his freedom and the *fideicommissum*? The opinion was given that they were due to him on the basis of the facts as stated.

25 ULPIAN, *Edict, book 7:* Anyone alleged to have provided false documents in the name of the praetor or to have issued a false edict is liable for cause to a penal *actio in factum*, although he may [also] be guilty under the *lex Cornelia.*

26 MARCELLUS, *Digest, book 30:* If anyone destroys his father's will and acts as heir as if [the father] had died intestate and then dies in his turn, it is entirely just that his heir should be deprived of his whole paternal inheritance.

27 MODESTINUS, *Rules, book 8:* It is a rule of law that those who give conflicting evidence should be liable as if they had committed forgery. 1. It is also laid down that a person who has given false evidence contrary to his own seal is liable to the penalty for forgery. There is no doubt that a person who gives different evidence to two different people and whose trustworthiness is thus equivocal and inconstant is liable to a charge of forgery. 2. A person who has acted as if he were a soldier, or used illegal marks of rank, or traveled the roads with a forged passport, is to be punished very severely according to the degree of his crime.

28 MODESTINUS, *Replies, book 4:* If on the day put forward by the debtor the contract of pledge is misrepresented by the creditor, there is scope for a charge of forgery.

29 MODESTINUS, *Problems Solved, sole book:* If anyone deceives the governor of a province, whether by means of official records or by the lodging of a [false] accusation, he achieves nothing. Indeed, if he is arraigned, he pays the penalty of his rash offense; for he is punished just as if he had committed forgery. There are rescripts on this point; however, it is enough, for the purposes of argument, to quote one whose words are these: "Alexander Augustus to Julius Marullus. If, after the laying of the accusation, your opponent has failed to include the truth in the petitions made by him, he may not make use of the document he signed; and indeed, if he be arraigned, one ought to inflict the penalty [on him]."

30 MODESTINUS, *Encyclopaedia, book 12:* A person is bound by the *lex Cornelia* on wills if he makes or engraves a counterfeit seal. 1. In the case of a substituted birth, only the parents, or persons affected by the matter, bring accusations; [it is] not for just any citizen to make a criminal accusation.

31 CALLISTRATUS, *Judicial Examinations, book 3:* The deified Pius wrote in a rescript to Claudius that sentence should be passed in accordance with the gravity of each offense on those who have produced before the judges legal documents which cannot be proved; or should it appear that they deserve more [punishment] than can be inflicted on them within the limits of the jurisdiction, the emperor should be sent a written note of the matter for him to consider how far they should be punished. However, the deified Marcus and his brother moderated this principle out of their humanity, so that if (as often happens) documents of this nature are laid before the court in error, those laying anything of the kind are pardoned.

32 MODESTINUS, *Punishments, book 1:* Nowadays, those who with malicious intent tamper with published edicts are inflicted with the penalty for forgery. 1. If a seller or a buyer tampers with the publicly approved measures of wine, corn, or any other thing, or commits a deception with malicious intent, he is sentenced to a fine of double the value of the thing concerned; and it was laid down by decree of the deified Hadrian that those who had falsified weights or measures should be relegated to an island.

33 MODESTINUS, *Punishments, book 3:* If anyone makes use of forged constitutions without authority, he is interdicted from fire and water under the *lex Cornelia.*

11

LEX JULIA ON EXTORTION

1 MARCIAN, *Institutes, book 14:* The *lex Julia* on extortion applies to those monies taken by anyone holding a magistracy, a position of power or administration, a legateship, or any other office, duty, or public employment, or while he is on the staff of any of these. 1. The law makes an exception for those from whom it is legitimate to accept [things], from cousins or blood relations of a closer degree or from a wife.

2 SCAEVOLA, *Rules, book 4:* This statute also admits an action against the heirs, provided that it be within one year of the death of the accused.

3 MACER, *Criminal Proceedings, book 1:* Under the *lex Julia* on extortion anyone is liable who, while holding any [position of] power, accepts money in return for giving or not giving a judgment or passing sentence,

4 VENULEIUS SATURNINUS, *Criminal Proceedings, book 3:* or for doing more or less than his duty.

5 MACER, *Criminal Proceedings, book 1:* Under this statute the companions of those holding judicial office are also liable to judgment.

6 VENULEIUS SATURNINUS, *Criminal Proceedings, book 3:* Under the same statute are liable those who accept money for giving or withholding evidence. 1. A person condemned under this law is prohibited from giving evidence publicly, from being a judge, or from bringing an accusation. 2. The *lex Julia* on extortion provides that no one is to accept cash for the appointing or posting of a soldier, nor to accept money to deliver his opinion in the senate or in any public council, or for lodging or not lodging an accusation; and that the urban magistrates shall refrain from all meanness and that they shall not accept any gift or favor in one year to the value of more than one hundred aurei.

7 MACER, *Criminal Proceedings, book 1:* The *lex Julia* on extortion lays down that no one shall take anything for the purpose of providing a judge or *arbiter*, or changing him, or ordering him to give judgment; nor for not providing, not changing, or not ordering him to give judgment; nor for throwing a man into the public prison, binding him, or ordering him to be bound, or releasing him from his chains; nor for condemning or acquitting any man; nor for assessing damages, or giving or not giving a judgment involving status or money. 1. However, it seems that the law allows the acceptance of an unrestricted amount from the excepted persons, but nothing at all, not even the smallest amount, from any of those set out in this chapter. 2. It is also provided that no credit is to be given for the carrying out of public works, for the giving, providing, or importing of corn for the public, or for the maintaining of buildings in good repair, before they are completed, approved, and answered for according to law. 3. Nowadays offenders under the law on extortion are punished *extra ordinem*, for the most part by exile, or some even harsher penalty, depending on what they have committed. What, then, if they accept money for killing a man, or, even if they have not accepted [money], are impelled by passion to kill an innocent man or one whom they ought not to have punished? They should suffer capital punishment, or at least deportation to an island, and most are punished in this way.

8 PAUL, *Edict, book 54:* Anything given to a proconsul or praetor in breach of the

statute on extortion cannot be usucapted. 1. The same statute voids sales or hirings made at a higher or lower price on those grounds, and prevents usucapion until the property returns to the control of him from whom it came, or of his heir.

9 PAPINIAN, *Replies, book 5:* Those who, after accepting money, have violated a duty publicly enjoined on them are accused on a charge of extortion.

12

LEX JULIA ON THE CORN SUPPLY

1 MARCIAN, *Institutes, book 2:* Legal proceedings have taken place between a slave and his master if the former states that the master has defrauded the public corn supply.

2 ULPIAN, *Duties of Proconsul, book 9:* The *lex Julia* on the corn supply lays down a penalty for the man who does something prejudicial to the corn supply or who enters into a partnership with the intention of putting up the price of the corn supply. 1. The same statute contains a provision that no one is to hold back a ship or a ship master or to do anything with malicious intent by which they may be delayed. 2. And a penalty of twenty aurei is laid down.

3 PAPIRIUS JUSTUS, *Imperial Constitutions, book 1:* The Emperors Antoninus and Verus, Augusti, wrote a rescript in these words: "It is grossly unjust for the decurions to sell grain to their citizens more cheaply than the corn supply requires." 1. The same emperors wrote in a rescript that it is not lawful for the *ordo* [of decurions] of any *civitas* to lay down the price of any grain which is found. Again, they wrote the following words in a rescript: "Even if women do not customarily bring this type of accusation, still, because you promise to produce evidence of matters which relate to the use of the corn supply, you have authority to inform the prefect of the corn supply."

13

LEX JULIA ON EMBEZZLEMENT [OF PUBLIC MONEY], ON SACRILEGE, AND ON MONEYS REMAINING

1 ULPIAN, *Sabinus, book 44:* It is provided by the *lex Julia* on embezzlement [of public money] that no one is to take [anything] away from any money dedicated to sacred or religious or public purposes, nor divert it, nor to convert it to his own use, nor to make it possible for anyone else to take away, divert, or convert it, unless he is a person to whom this is permitted by statute. Nor is anyone to put anything into, or mix anything with, the gold, silver, and bronze [which is] public [property], so as to debase it, nor, knowingly and with malicious intent, to make possible such an addition or mixing.

2 PAUL, *Sabinus, book 11:* A person is liable under the *lex Julia* on moneys remaining if he has retained public money entrusted to him for a particular purpose and has not used it all up for that purpose.

3 ULPIAN, *Adulteries, book 1:* The penalty for embezzlement [of public money] includes interdiction from fire and water, which has today been succeeded by deportation. In addition, anyone who is reduced to this status forfeits his property as well as all his former legal rights.

4 MARCIAN, *Institutes, book 14:* A person is liable under the *lex Julia* on embezzlement [of public money] if he takes away or intercepts any money dedicated to sacred or religious purposes. 1. Also, anyone who removes something given to an immortal god is liable to the penalty for embezzlement [of public money]. 2. It is laid down further in the [imperial] mandates on sacrilege that provincial governors are to track down those who commit sacrilege, brigands, and kidnappers, and punish each according to the degree of his offense. And it is so provided in the constitutions, that those who commit sacrilege are to be punished with a fitting penalty *extra ordinem.*

5 (4,3) MARCIAN, *Institutes, book 14:* A person is liable under the *lex Julia* on moneys remaining if there remains in his possession public money as the result of a lease, a purchase, the provision of foodstuffs, or some other purpose. 1(4). In addition, anyone who receives public money for any purposes and does not pay it out but keeps it is liable under this law. 2(5). A person found guilty under this statute is fined one third more than the amount he owes. 3(6). Treasure trove does not become *religiosus* from the place where it is found; for even if it is found in a [funeral] monument it is not carried off as if *religiosus*. For that which a person is forbidden to inter he cannot make *religiosus*; and, as is provided in the imperial mandates, money cannot be interred. 4(7). But also, if someone abstracts anything from the property of a *civitas*, it is provided in the constitutions of the deified Emperors Trajan and Hadrian that the offense of embezzlement [of public money] is committed; and we follow this law.

6 (5) MARCIAN, *Rules, book 5:* The deified Severus and Antoninus wrote in a rescript to Cassius Festus that if the property of private individuals is stolen from a building dedicated to the gods in which it has been lodged, there is an action for theft, not for sacrilege.

7 (6) ULPIAN, *Duties of Proconsul, book 7:* The proconsul ought to impose the penalty for sacrilege more or less severely, depending on the status, age, and sex of the person, the nature of the property, and the time. I know indeed that many have been condemned to the wild beasts for sacrilege, some even burned alive, and others hanged on the gallows. But the penalty should be tempered to restrict condemnation to the beasts to those who have formed a band, broken into a temple, and carried off from there the god's offerings by night. But he who in the daytime takes an article of moderate value from a temple should be punished by sentence to the mines, or, if he was born to a higher position, he should be deported to an island.

8 (6,1) ULPIAN, *Duties of Proconsul, book 7:* Public slaves who, while employed in the mint, stamp for themselves money outside the premises with the public die, or who steal stamped coin, are not regarded as engaging in forgery of the coinage, but as having committed a theft of public money, a charge which is assimilated to that of embezzlement [of public money]. 1(2). Should anyone have stolen gold or silver from the imperial mines, he is punished under an edict of the deified Pius by exile or condemnation to the mines, according to his rank. Further, he who provides a hiding place for the thief is just as liable as if he had been found guilty of manifest theft, and is made infamous. Anyone who unlawfully possesses gold from a mine and melts it down is condemned to a penalty of four times its value.

9 (7) VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* A charge of embezzlement [of public money] ought not to be brought in respect of an act committed more than five years previously.

10 (8) VENULEIUS SATURNINUS, *Criminal Proceedings, book 3:* Anyone who takes down the bronze tablet of a law or an official map [of the distribution] of lands or [a tablet] containing anything else or alters any part of it is liable under the *lex Julia* on embezzlement [of public money]. 1. Anyone who makes a deletion from or addition to the public records is liable under the same statute.

11 (9) PAUL, *Criminal Proceedings, sole book:* Those who commit sacrilege suffer capital punishment. 1. Sacrilege is committed by those who have pillaged sacred things which belong to the public. However, persons who have laid hands on sacred things in private possession, or on petty shrines without guards, deserve a heavier

penalty than [simple] thieves but a lighter one than those guilty of sacrilege. For this reason, you must consider carefully the nature of the sacred object or whether the deed incurs a charge of sacrilege. 2. Labeo, in the thirty-eighth book of his *Posthumous Works*, defines embezzlement [of public money] as a theft of money belonging to the public or the gods above, carried out by some person who was not responsible for it, and accordingly a temple caretaker [can]not commit embezzlement [of public money] in respect of the property delivered to his care. 3. Later in the same chapter, [Labeo] writes that not only public but also private money can give rise to a charge of embezzlement [of public money], if someone pretending to be a creditor of the imperial treasury has received money owing to it, even though the money that he took was private. 4. However, a person who takes money for the purpose of passing it on or any other person who has responsibility for the money does not commit embezzlement [of public money]. 5. The senate has ordered that those persons should be liable under the law on embezzlement [of public money] who, without the orders of the person in charge, give permission for the inspection and transcription of public records. 6. Labeo has written in the thirty-eighth book of his *Posthumous Works* that a person who has retained public money intended for any purposes and not spent it is liable under this law. He states that an action for moneys remaining does not, however, lie against a person who, on leaving his province, retains the money which was in his possession after making his return to the state treasury, because he [now] owes it to the imperial treasury as a private person, and is therefore classed among its debtors; and the person who enjoys this office shall exact it from him, that is, by taking a pledge, by detaining his person, or by imposing a fine. However, the *lex Julia* on moneys remaining has ordered that after one year, this money also shall be treated as remaining.

12 (10) MARCIAN, *Criminal Proceedings, book 1:* A person is liable under this law if he writes down in the public records a smaller sum than the actual proceeds of a sale or public letting, or does anything else of the kind. 1. When a young man of senatorial family had been found to have placed a small chest in a temple and to have shut inside it a man who, after the temple had closed, got out of the chest, stole a great deal of property from the temple, and climbed back into the chest again, the deified Severus and Antoninus after his conviction deported him to an island.

13 (11) ULPIAN, *Edict, book 68:* A person who bores holes through the walls of a temple or takes anything thence is liable to an action for embezzlement [of public money].

14 (12) MARCELLUS, *Digest, book 25:* There is no question of embezzlement [of public money] being committed if I demand money from a person who is debtor to both myself and the imperial treasury; for there is no diversion of the treasury's money by taking this away from its debtor, since he remains the treasury's debtor no less [than before].

15 (13) MODESTINUS, *Punishments, book 2:* A person who has stolen booty captured from the enemy is liable under the statute on embezzlement [of public money] and is condemned to pay four times the amount.

16 (14) PAPINIAN, *Questions, book 36:* Criminal proceedings for embezzlement [of public money] and for monies remaining and for extortion are likewise brought against the heir; nor is this unjustified, since in these cases the main issue relates to the money taken.

14

THE *LEX JULIA* ON ELECTORAL CORRUPTION

1 MODESTINUS, *Punishments, book 2:* This law is nowadays of no effect in Rome, since the creation of magistrates is a matter for the attention of the emperor and not for the favor of the people. 1. But if anyone in a municipality seeks a magistracy or a priesthood contrary to this statute, he is punished by *senatus consultum* with a fine of one hundred aurei and with *infamia.* 2. Should a person condemned under this statute convict another person, he is restored to his previous status, but does not recover his money. 3. Again, he who introduces a new tax is by *senatus consultum* inflicted with the same penalty. 4. And if anyone, accused or accuser, enters the judge's house, by the *lex Julia judiciaria* he commits an offense against the law on electoral corruption, that is, he is ordered to pay one hundred aurei to the imperial treasury.

15

LEX FABIA ON KIDNAPPERS

1 ULPIAN, *Rules, book 1:* If a buyer knowingly buys a freeman, this gives rise to a capital charge against him under the *lex Fabia* on kidnapping, to which the seller also is liable if he sells him knowing him to be free.

2 ULPIAN, *Duties of Proconsul, book 9:* You should know that the *lex Fabia* does not apply to those who have sold absent slaves whom they own; for it is one thing to be absent and another to be on the run. 1. Again, it does not apply to a man who has given a mandate that a runaway slave be pursued and sold off; for he has not sold him in flight. 2. To put it more fully, if someone gives a mandate to Titius that he is to seize a runaway slave so that, if he has seized him, he may treat him as having been bought, the *senatus consultum* does not apply. 3. However, this *senatus consultum* also covers masters who sell their slaves while in flight.

3 MARCIAN, *Criminal Proceedings, book 1:* A bona fide *possessor* is not liable to a charge under the *lex Fabia* of concealing a slave, that is, someone who was unaware that the slave was another's and thought that he was acting at the master's wish. The statute itself is drafted thus concerning the bona fide *possessor*; for it adds "if he does so knowingly, with malicious intent"; and it was very frequently laid down by the Emperors Severus and Antoninus that bona fide *possessores* are not to be liable under this statute. 1. One must not omit [to mention] that, as in the case of the *lex Aquilia,* if the one on whose account a person has committed an offense under the *lex Fabia* dies, the charge, and the penalty under the *lex Fabia,* survive, as the deified Severus and Antoninus wrote in a rescript.

4 GAIUS, *Provincial Edict, book 22:* Under the *lex Fabia* someone is liable who knowingly makes a gift of a freeman or gives him as a dowry; again, he who for any of those reasons accepts him, knowing him to be a freeman, should be regarded as in the same category as the seller and buyer. It is the same if property be given in exchange for him.

5 MODESTINUS, *Replies, book 17:* The opinion was given that a person who is shown to have received and concealed another's runaway slave could have very little chance of avoiding the charge, if it were proved, on the grounds that he was raising the question of ownership.

6 CALLISTRATUS, *Judicial Examinations, book 6:* A person is not immediately to be [reckoned as] a kidnapper because he is liable to a charge of theft for appropriating other men's slaves, as the deified Hadrian wrote in a rescript, in these words: "Whether

the man who entices or steals others' slaves is liable to the charge of kidnapping brought against him or not is a question of fact; and, therefore, the correct course is not to consult me, but the judge should follow what is found to be most true in the matter before him. It should, however, be clearly understood that a person can be liable to a charge of theft for stealing others' slaves without immediately being reckoned a kidnapper on that account." 1. The same emperor wrote in a rescript on the same subject in the following words: "The man on whose premises are found one or two runaway slaves who have hired out their services for food, particularly if they have previously done such work for others, cannot rightfully be called a concealer [of another's slave]." 2. It is laid down by the *lex Fabia* that a freeman who hides another, freeborn or freed, against his will, or keeps him in fetters or buys him, knowingly and with malicious intent, or who is an accomplice in any of these things, and anyone who persuades another's slave, male or female, to run away from his master or mistress, or conceals him or her against the will or without the knowledge of the master or mistress, or keeps him in fetters, or buys him, knowingly and with malicious intent, or who is an accomplice in the matter, is liable to the penalty [of the statute].

7 HERMOGENIAN, *Epitome of Law, book 5:* The money penalty laid down by the *lex Fabia* has fallen out of use; for those detected in this crime are punished according to the degree of their wrongdoing, and are mostly condemned to the mines.

16

SENATUS CONSULTUM TURPILLIANUM AND THE ANNULMENT OF CHARGES

1 MARCIAN, *The Senatus Consultum Turpillianum, sole book:* Rashness in accusers is revealed in three ways and subject to three penalties: they may calumniate, prevaricate, or tergiversate. 1. Calumny is the bringing of false charges, prevarication the concealment of genuine ones, while tergiversation means the complete abandonment of accusations [once made]. 2. Calumniators are subjected to the penalty of the *lex Remmia.* 3. It is, however, not the case that a person who fails to prove what he set out to do is forthwith regarded as a calumniator; for the investigation of that matter is entrusted to the discretion of the judge in the case who, on the acquittal of the accused, begins to look into the intention of the accuser and the state of mind which led him to bring the accusation. If he finds that there was a reasonable mistake on his part he clears him; but if he catches him in a manifest calumny, he inflicts the penalty of the law on him. 4. Which of the two [verdicts he reaches] is made clear by the words themselves of his pronouncement. For if, indeed, he pronounces, "you have not proved [your case]," he has acquitted him; but if, on the other hand, he pronounces, "you have committed calumny," he has condemned him. And although the judge makes no suggestion of penalty, the power of the statute will still be exercised against him; for, as Papinian said in an opinion, a question of fact is at the judgment of the person conducting the trial, but the infliction of punishment is not left to his discretion but is reserved for the authority of statute. 5. The question may be asked whether, if the judge's decision is in the words: "Lucius Titius appears to have brought a rash accusation," he would seem to have pronounced him a calumniator. Papinian['s view is that] the heedlessness of his fluency contains [grounds for] a pardon, that his sudden heat lacks the essential fault of calumny and that on this account he should not suffer any penalty. 6. The prevaricator we demonstrate to be the man who colludes with the accused and discharges his duty of accusation negligently by concealing his own proofs and accepting the accused's spurious defenses. 7. If anyone drops an accusation short of its annulment, he is punished. 8. It is customary for annulment in a private capacity to be

sought and obtained from the provincial governor, and in court, not unofficially; nor can the judge hand over this jurisdiction to another. 9. If the same [accuser] has brought several charges against the same [accused], he must seek their annulment individually; otherwise, on account of any he omits he will suffer the penalty of the *senatus consultum*. 10. An accusation has been brought by a man who could have been barred by prescription, such as someone proceeding for adultery against the man after the five years next following the date of the act of adultery, or against the woman after the six available months from the date of the divorce; there is [then] a nice doubt whether, if he drops his accusation, he should be punished under this *senatus consultum*. It is relevant that there will be practically no accusation which lapse of time or defect of person would totally remove, and which would offer the accused immunity from fear and risk. On the other hand, it is also relevant that any type of accusation once brought must be annulled by the authority of the judge, not at the wish of the accuser, and [that] the man who had rashly proceeded to so shameless an accusation should be reckoned as deserving of greater odium. The more correct view, therefore, is that he of whom we are speaking ought also to fall under the *senatus consultum*. And yet Papinian gave an opinion that a woman, who on account of her sex was not allowed to bring an accusation of fraud since she was not pursuing her own wrong or that of her family, was on dropping [the accusation] not liable to punishment under the *senatus consultum Turpillianum*. Would he then have given the same opinion in other cases also? For what difference does it make if the reason for barring a person from some accusation is the infirmity of their sex or the turpitude of their condition, or the ending of the time period? [The last two groups] are much more to be excluded [from the scope of the *senatus consultum*], in that a woman's accusation, at least if it relates to her own grief, could have effect, while the accusation of those others is brought into play only so far as to be voiced. And yet the same [Papinian] writes elsewhere that a person cannot bring simultaneous accusations of adultery against two persons, male and female; yet if he were to denounce both at the same time, he must seek the annulment [of the charge] against each if he is to avoid falling under this *senatus consultum*. What then is the difference between an accusation that is invalid for the reasons stated above, and one which is not sustained because of the number of persons concerned? May these be the points of difference: that though one person has full competence to bring an accusation, he may be barred from a [particular] accusation by having accused the pair together; or, on the other hand, on a strict construction, may the power to accuse [simply] not be available to certain persons? Therefore, it must rightly be said that everyone, with the exception of a woman or a *minor*, unless he seeks the annulment [of his accusation], falls under this *senatus consultum*. 11. An accusation of a tutor who is suspect can be examined only before the court, and no person other than the governor can pronounce sentence in proceedings of this nature; furthermore, anyone who drops [such an accusation] is not liable under the *senatus consultum*. 12. Again, if anyone alleges that [another] has fallen under the *senatus consultum Turpillianum*, this is for the governor to take cognizance of; but if he abandons [this allegation] the punishment of the *senatus consultum* does not apply against him, since a person who alleges that anyone has fallen under this *senatus consultum* is not an accuser. 13. A person does fall under the *senatus consultum* if he puts up or institutes an accuser, or if he commissions another and arranges for him to bring a capital accusation, by giving him proofs and furnishing him with charges. And rightly so; for by his lack of belief in the charge he is prompting and by his action in removing himself from the risk of calumny or desertion, he has rightly deserved to suffer the penalty of a calumniator and deserter, unless the person whom he suborned to bring the accusation proves the charge that he set out to do. Nor does it matter whether he commissioned the accusation himself or through the agency of another; indeed, Papinian gave an opinion that he who makes use of such services to commission an accusation is to be punished under the spirit, though not the words, of the *senatus consultum*. The suborned accuser is similarly punished under the same *senatus consultum*, that is, he is punished for the sole reason that he accepted a commission to put a third party in fear. 14. A convicted accused has lodged an appeal, and subsequently his accuser has dropped the charge; is [the latter] liable under this *senatus consultum*? It almost seems that he is, because the sentence of condemnation is annulled by the remedy of the appeal.

2 PAUL, *Punishments under All the Statutes, sole book:* A person who has dropped [a charge] is forbidden to proceed further and lay an accusation.

3 PAUL, *Views, book 1:* In private indictments as in accusations *extra ordinem* all persons guilty of calumny are punished *extra ordinem* according to the degree of their offense.

4 PAPINIAN, *Replies, book 15:* A woman who, after the lodging of her accusation, has dropped and abandoned a charge of forgery involving her own wrong does not appear to be bound by the *senatus consultum Turpillianum.* 1. After an annulment, the same charge cannot be instituted by the same person against the same [accused].

5 PAUL, *Replies, book 2:* Is a person who, in a complaint presented to the emperor, has threatened to bring a charge of forgery liable under the *senatus consultum Turpillianum,* should he have failed to do so? Paul gave the opinion that the man in question was not covered by the words of the *senatus consultum Turpillianum.*

6 PAUL, *Views, book 1:* A person has dropped an accusation if he discusses with his opponent the compromising of the charge which he was bringing. 1. A person has dropped an accusation deliberately if he has laid aside the state of mind and intention of bringing that accusation. 2. A person appears to have dropped [his accusation] if he fails to carry through proceedings against the accused within the time prescribed for the accusation by the governor. 3. Informers who lay informations by means of a written statement notifying a crime are required to stand by their written statements. 4. Those who are alleged to have sought out or written or brought before the court any written matter, evidence, or anything else to anyone's peril are punished for their calumny.

7 ULPIAN, *Disputations, book 8:* If anyone should wish to resume an accusation following a general amnesty, he does so on the same legal grounds on which he brought his earlier accusation; for prescriptions may not be brought forward against him which were not brought forward before the amnesty of accused persons. The deified Hadrian also wrote to this effect in a rescript. 1. If anyone brings a charge of fraud, or of the despoliation of an inheritance, and drops it, he will not undergo the penalty of the *senatus consultum Turpillianum,* nor if [the charge be] of theft or *injuria;* but it will be the function of the judge to punish his fault.

8 PAPINIAN, *Adulteries, book 2:* An annulment takes place, either publicly on the day of some happy event or general thanksgiving,

9 MACER, *Criminal Proceedings, book 2:* Or of some affair which has been brought to a successful conclusion,

10 PAPINIAN, *Adulteries, book 2:* or privately at the request of the pursuer. In a third category there is annulment according to statute, where the accuser has died or for good cause there is some other hindrance whereby he cannot bring an accusation. 1. However, after the making of a public annulment the court will not refuse someone prosecuting again with a husband's right. 2. The deified Trajan explained that thirty days were to be available for renewing the action against the accused, that is, from the day on which the holiday ended. And the senate considered that [only] those days run on which anyone can renew the action against the person accused by him. For this time for renewing the action against the accused only runs if the accuser also was able to be present [in court].

11 PAPINIAN, *Adulterers, sole book:* The question used to be asked whether those who

had been barred from making accusations by reason of time fell under the *senatus consultum Turpillianum.* He gave the opinion that there should be no doubt that those who had been unable to bring an action for adultery because they were barred by prescription of time could not be punished for calumny.

12 ULPIAN, *Adulteries, book 2:* On the occurrence of a general annulment by *senatus consultum* as is customary, whether because of some festivity, or the honoring of a consecrated temple, or some other reason which led the senate to decide that there should be an amnesty for accused persons, if someone does not renew his action against the accused within the appointed day, it must be said that the *senatus consultum Turpillianum* ceases [to have effect]. For a person is not seen as dropping [his accusation] if he does not accuse a defendant who has been exempted [in this way]; and by the occurrence of the annulment there is exemption for accused persons.

13 PAUL, *Adulterer, book 3:* We shall agree that a man has dropped [his accusation] who has completely given up the intention of carrying on with it, [but] not he who has postponed the accusation. 1. However, a person who has dropped his accusation with the permission of the emperor goes unpunished.

14 ULPIAN, *Duties of Proconsul, book 7:* The deified Hadrian wrote in a rescript to Salvius Carus, proconsul of Crete, that a tutor who had instituted an accusation on behalf of his pupil should not be compelled to go through with it on the death of the pupil on whose behalf he had commenced the accusation.

15 MACER, *Criminal [Proceedings], book 2:* Persons fall under the *senatus consultum Turpillianum* who have suborned accusers, or made accusations after having been suborned and have not carried through proceedings against those charged, or have dropped an accusation otherwise than because an annulment has been granted; and who have given a promissory note in return for the making of an accusation, or concluded any kind of agreement. It should be stated that the phrase "and have not carried through" [their accusations] relates to all the above-mentioned persons. 1. Does the *senatus consultum* apply to those who nowadays conduct criminal proceedings *extra ordinem*? But the legal principle, based on imperial constitutions, that we now use, applies in such a way that individual penalties are imposed in individual cases. 2. It is provided by the constitutions that those persons against whom an action for calumny is not allowed, do not incur the penalty of this *senatus consultum* if they should drop an accusation. 3. If the accuser drops [his charge] because of the death of the accused, he cannot be liable under this *senatus consultum*, because the case is discharged by the death of the accused, unless the crime was of such a kind that an action survives against the heirs, for example [a charge] of treason. The same is true of an accusation of extortion, because this too is not discharged by death. 4. However, if the accused dies after his accuser has dropped [the case], the accuser's fault is not the more removed by this. Severus and Antoninus laid down that a person who has once dropped [his accusation] should not be given a hearing if he should subsequently be prepared to bring the accusation. 5. Those who, after laying an accusation in writing [but] before issue is joined, are not able to raise the action within one or two years because their attention is engaged elsewhere by various gubernatorial duties or even by the requirements of civil office, do not fall under the *senatus consultum.* 6. Although a person had accused a defendant beforehand, if, following an annulment but before he could resume the action against the accused another annulment occurs, the thirty days are reckoned from the date of the second, not the first annulment.

16 PAUL, *Adulterers, sole book:* Domitian wrote in a rescript that what is stated about holidays and the amnesty of accused persons does not apply to slaves, who, when accused, are commanded to be kept in chains until their trial is concluded.

17 MODESTINUS, *Replies, book 17:* Lucius Titius accused Seius of forgery and, before

he had carried through the case to the end, the charges were annulled under an amnesty for accused persons. My question is: does he fall under the *senatus consultum Turpillianum* if he subsequently fails to accuse him again? Herennius Modestinus gave the opinion that an amnesty for accused persons, which is a public concession, does not relate to this type of charge.

18 PAPIRIUS JUSTUS, *Constitutions, book 1:* The Emperors Antoninus and Verus, Augusti, wrote in a rescript to Julius Verus, when he was alleged to have pursued a lawsuit for a fairly long time, that he could not accept an annulment against the wishes of his opponent. 1. They further wrote that unless there was clear proof of the opponent's agreement, an annulment would not be granted. 2. They further wrote that although he alleged that an amendment had been applied for in a capital charge as though it were a pecuniary matter, nevertheless, the inquiry should be re-opened so that if he had not proved what he claimed, he should not go unpunished.

17

WANTED PERSONS OR THOSE WHO MAY BE CONDEMNED IN THEIR ABSENCE

1 MARCIAN, *Criminal [Proceedings], book 2:* The deified Severus and Antoninus the Great wrote in a rescript that no one should be punished in his absence; and we apply this rule, that absent persons should not be condemned; for the argument of justice does not permit of a person's being condemned without his case being heard. 1. If, however, someone is to be punished more severely, say [by condemnation] to the *opus metalli* or something of the kind, or to a capital penalty, in this event the penalty should not be inflicted on an absent person, but the absent one should be searched for and registered [among the accused] so that he may take the opportunity [of defending] himself. 2. Provincial governors, however, as regards wanted persons who have been registered, must act as follows: They must order by edict those whom they have registered to attend, so that it may come to their notice that they have been registered; and [the governors] must also send letters to the [local] magistrates where [the wanted persons] reside so that by their agency it can become known that the wanted men have been registered. 3. And the one-year period for them to clear themselves is reckoned from this time. 4. And Papinian, in the sixteenth book of his *Replies*, has written that if a wanted person who has been registered attends before the provincial governor within the year and gives satisfaction, there is no scope for orders that his property be forfeit to the imperial treasury. For if he were to die within the year, the charge against him expires and lapses, and his property passes to his successors.

2 MACER, *Criminal [Proceedings], book 2:* The period of one year applies to taking possession of the property of a wanted person who has been registered. 1. But if the imperial treasury fails to take possession of the property during the space of twenty years, it will thereafter be barred by prescription [from taking possession] either from the accused himself or from his heirs.

3 MARCIAN, *Criminal Proceedings, book 2:* For it was the wish of the deified emperors that any sort of dispute involving the imperial treasury, if there were no other specific prescription, should be barred by twenty years' silence.

4 MACER, *Criminal Proceedings, book 2:* The year is to be reckoned from the time when the registration which relates to the wanted man became public knowledge,

either by edict or by letters addressed to the magistrates. 1. The imperial treasury's twenty years are therefore also counted from the time when the registration became public knowledge. 2. Finally, it should be noted that by no lapse of time may a wanted person who is registered be barred from defending his case.

5 MODESTINUS, *Encyclopaedia, book 12:* It is provided in mandates that within the year the property of wanted persons is [to be] sealed up, so that if they return and clear themselves they may have their property intact; if they neither reply nor have anyone to enter a defense on their behalf, then at the end of the year their property is collected for the imperial treasury. 1. Again, within the one-year period, if in the meantime there are any items of automotive property, the deified Severus and Antoninus have confirmed that they should be sold and the proceeds placed on deposit, so that they may not deteriorate by the delay or perish in any way. 2. The deified Trajan wrote in a rescript that fruits are also to be classed with automotive property. 3. Care must, however, be taken that a person who has absconded does not meantime receive any payments from his debtors, lest in this way means be furnished for him to flee.

18

INVESTIGATIONS

1 ULPIAN, *Duties of Proconsul, book 8:* It is customary for torture to be applied to unearth crimes; but let us see when and how far this should be done. The deified Augustus laid down that one should not begin with the application of pain, and that reliance should not be placed entirely on torture, as is contained also in the deified Hadrian's letter to Sennius Sabinus. 1. The words of the rescript are as follows: "Recourse should only be had to the infliction of pain on slaves when the criminal is [already] suspect, and is brought so close to being proved [guilty] by other evidence that the confession of his slaves appears to be the only thing lacking." 2. The deified Hadrian wrote the same in a rescript to Claudius Quartinus; in which rescript he stated that a start should be made with the most suspect person and the man from whom the judge believes that he can most easily learn the truth. 3. It is declared in a rescript issued by the deified brothers to Lucius Tiberianus that persons produced by the accuser from his own household should not be summoned to the torture, nor should it readily be believed that she whom both her parents are said to have treated as their beloved daughter is a slave. 4. The same [emperors] sent a rescript to Cornelius Proculus that reliance should certainly not be placed on the torture of a single slave, but that the case should be examined by proofs. 5. The deified Antoninus and the deified Hadrian to Sennius Sabinus wrote in rescripts that when slaves were alleged along with their master to have sent gold and silver out of the country, they should not be questioned about the master in case they should of their own accord say something which would prejudice him. 6. The deified brothers wrote in a rescript to Lelianus Longinus that torture should not be applied to a slave belonging to an heir in matters concerning the inheritance, even though it had been suspected that the heir appeared to have sought the right of ownership over that [slave] by means of an imaginary sale. 7. It has very frequently been written in rescripts that a slave belonging to a municipality [may] be tortured in capital cases affecting the citizens because he is not their slave but the state's, and the same should be said of other slaves belonging to corporate bodies; for the slave appears to belong, not to a number of individuals, but to

the body [itself]. 8. Should a slave serve me in good faith, even though I have not acquired actual ownership over him, it can be said that he should not be tortured in a capital case affecting me. The same applies to a freeman who serves in good faith. 9. It is also laid down that a freedman is not [to be] tortured in a capital case affecting his patron. 10. Nor indeed, as our emperor and his deified father wrote in a rescript, should a brother [be tortured] in [a capital case affecting] his brother, adding the reason that a person should not be tortured [to give evidence] against someone against whom he [can]not be compelled to give evidence against his wish. 11. The deified Trajan wrote in a rescript to Sernius Quartus that a husband's slave could be tortured in a capital case affecting his wife. 12. The same [emperor] wrote in a rescript to Mummius Lollianus that the slaves of a condemned man, because they have ceased to be his property, can be tortured [to give evidence] against him. 13. The deified Pius wrote in a rescript that if a slave is manumitted to avoid his being tortured, then, provided that he is not tortured in a capital case affecting his master, he can be tortured. 14. The deified brothers also wrote in a rescript that a [slave] who at the outset of a trial was the property of another, even if he subsequently becomes the property of the accused, can be tortured in a capital case against the latter. 15. If [a slave] should be said to have been bought invalidly, he cannot be tortured until it has been established that the sale was of no effect, according to a rescript of our emperor and his deified father. 16. Again, Severus wrote a rescript to Spicius Antigonus as follows: "Since information under torture ought neither to be obtained from slaves against their masters, nor, if this is done, should it guide the counsel of the person who is to pronounce sentence, much less should informations laid by slaves against their masters be admitted." 17. The deified Severus wrote in a rescript that the confessions of accused persons should not be taken as equivalent to crimes established by investigation, if there were no [objective] proof to guide the conscience of the judicial examiner. 18. Although a certain person had been prepared to put down the price of a slave, so that the slave might be tortured [to give evidence] against his master, our emperor and his deified father did not allow it. 19. Should slaves be tortured as participants in a crime in their own right and confess something concerning their master to the judge, the deified Trajan wrote in a rescript that [the judge] should pronounce as the case requires. In this rescript, it is demonstrated that masters may be injured by their slaves' confessions. But subsequent constitutions show a retreat from this rescript. 20. In a case involving tribute, in which no one doubts that the sinews of the state are concerned, the consideration of the risk, which threatens capital punishment to a slave who is privy to a fraud, corroborates his declaration. 21. The person who is going to conduct the torture should not ask specifically whether Lucius Titius committed a homicide, but in general terms who did it; for the former seems rather the action of someone suggesting [an answer] than seeking [the truth]. And so the deified Trajan wrote in a rescript. 22. The deified Hadrian wrote a rescript to Calpurnius Celerianus in these words: "Agricola, the slave of Pompeius Valens, can be interrogated concerning himself. If under torture he should say more than this, it is taken as evidence against the accused, not as a fault in the interrogation." 23. It is stated in constitutions that reliance should not always be placed on torture—but not never, either; for it is a chancy and risky business and one which may be deceptive. For there are a number of people who, by their endurance or their toughness under torture, are so contemptuous of it that the truth can in no way be squeezed out of them. Others have so little endurance that they would rather tell any kind of lie than suffer torture; so it happens that they confess in various ways, incriminating not only themselves but others also. 24. Moreover, you should not place confidence in torture applied to [a person's] enemies, because they readily tell lies. Not, however, that [all] confidence in torture should be lost where enmity is alleged. 25. And it is [only] when the case has been investigated [that you will know] whether you can have confidence or not. 26. There is found in a number of rescripts [the principle] that when someone has betrayed brigands, reliance should not be placed on the latter's [accusations] against those who betrayed them; but in certain [rescripts] that deal with the

subject more fully there is the proviso that you should neither make it a rigid rule not [to rely on them], nor rely on them as you would in the case of other witnesses; but when the case has been examined, it should be considered whether to trust them or not. For most people, when they fear that [others], on being arrested, may perhaps name them, are accustomed to betray those [others first] as it were clutching at immunity for themselves; for it is not easy to believe those who inform on their own betrayers. But immunity should not indiscriminately be allowed to those making betrayals of this kind, nor should the [counter] allegations of those who say that they were accused solely because they themselves had handed over men [who have now denounced them] be disregarded; nor should any argument that they put forward of falsehood or calumny deployed against them [necessarily] be treated as invalid. 27. If a person should confess to wrongdoing of his own accord, he should not always be believed; for sometimes people confess out of fear or for some other reason. There is extant a letter of the deified brothers to Voconius Saxa, in which is contained the principle that a man should be freed who had made a confession against himself but who, after condemnation, had been found to be innocent. Its words are as follows: "My dear Saxa, you have acted prudently and with the excellent motive of humanity in condemning the slave Primitivus, who had been suspected of fabricating [a confession of] homicide against himself for fear of going back to his master and was persisting in his false evidence, with the aim of interrogating him about the accomplices whom he had equally mendaciously declared himself to have, so that you could get a more reliable confession than his about himself. Nor was your prudent scheme in vain, since under torture it was established that they had not been his accomplices and that he had rashly told lies about himself. You can, therefore, set aside the verdict and by virtue of your office order him to be sold off with the proviso added that at no time is he to return to the power of his master, who, we are advised, now that he has received compensation will gladly be rid of such a slave." By this letter it is indicated that a seemingly condemned slave, if he be reinstated, will be the property of him who owned him before he was condemned. A provincial governor, however, does not have the power to reinstate a person whom he has condemned, since he does not [even] have the power to revoke his own imposition of a fine. What then [must he do]? He should write to the emperor if at any time proof of innocence is subsequently established for a person who had appeared to be guilty.

2 ULPIAN, *Edict, book 39:* As long as there is doubt about the ownership of the property the slaves of an inheritance cannot be tortured in a capital case affecting their master.

3 ULPIAN, *Edict, book 50:* By a constitution of our emperor and the deified Severus, it was settled that a slave who belongs to a number of persons cannot be tortured in a capital case affecting any one of them.

4 ULPIAN, *Disputations, book 3:* As Papinian stated in an opinion, and as is laid down by rescript, in a case of incest the torturing of slaves is not applicable, since the *lex Julia* on adultery also does not apply.

5 MARCIAN, *Institutes, book 2:* If anyone has sexual relations with a female relative, whether a widow or married to another, with whom he cannot contract a marriage, he is to be deported to an island, since his crime is twofold: both incest, because he has violated a kinswoman contrary to what is lawful, and adultery, or *stuprum.* Finally, in this case, slaves are liable to torture [to give evidence] against their master's person.

6 PAPINIAN, *Adulteries, book 2:* When a father or husband is bringing an action for adultery and they request the torturing of the slaves of the accused, then, if an acquittal should follow after the case has been wound up and the witnesses produced, an assessment is made of the value of the slaves who have died; however, if a condemnation follows, the surviving [slaves] are forfeit to the state. 1. When there is an investigation into a forged will, the slaves of the inheritance can be tortured.

7 ULPIAN, *Adulteries, book 3:* The prevailing view is that it is the duty of the judges to weigh the degree of torture; for the torture should be so conducted that a slave survives, whether for acquittal or punishment.

8 PAUL, *Adulterers, book 2:* An edict of the deified Augustus, which he issued to the consuls Vibius Habitus and Lucius Apronianus, is extant as follows: "I do not think that interrogations under torture ought to be requested in every case and person; but when capital or more serious crimes cannot be explored and investigated in any other way than by the torturing of slaves, then I think that those [interrogations] are the most effective means of seeking out the truth and I hold that they should be conducted." 1. A *statuliber* can be cited in a case of adultery for examination under torture, because he is the slave of the heir; but he will retain his hope [of freedom].

9 MARCIAN, *Criminal Proceedings, book 2:* The deified Pius wrote in a rescript that interrogation under torture may be applied to slaves in a case involving money, if the truth cannot be found in any other way. The same provision is found in other rescripts. But it is the case that torture may not readily be applied in a matter involving money; but if the truth cannot be found otherwise than by physical pains, then it is permissible to use torture, as the deified Severus also wrote in a rescript. Therefore, it is lawful to torture the slaves of other persons also, if the case so suggests. 1. In those cases, where the torture of slaves against their masters should not be employed, it has been stated that not even interrogation [without torture] is valid; much less admissible are [voluntary] informations laid by slaves against their masters. 2. The deified Pius wrote in a rescript that a person who has been deported to an island should not be interrogated under torture. 3. Neither is a *statuliber* to be tortured in cases involving money, unless the condition [on which he is to be freed] is not satisfied.

10 ARCADIUS CHARISIUS, *Witnesses, sole book:* A person below the age of fourteen is not to be interrogated under torture, as the deified Pius wrote in a rescript to Caecilius Juventianus. 1. But all persons without exception are subject to torture if they are called to give evidence, when the case requires it, in a charge of *majestas*, because it touches on the persons of the emperors. 2. It is possible to ask whether interrogation under torture cannot be applied to the slaves of a son's *peculium castrense* in a capital case affecting his father; for it is laid down that the father['s slaves] ought not to be tortured [to give evidence] against the son. I think it is correctly stated that neither ought the son's slaves to be interrogated in a capital case affecting his father. 3. Tortures, however, are not to be applied to whatever extent the accuser demands, but as the due measure of well-regulated reason requires. 4. Nor should the accuser make a beginning of his proofs from the household of the accused, calling the freedmen or slaves of him whom he is accusing to give evidence. 5. Again, in sifting out the truth, the actual voice [of the witness] and the subtle persistence of the judicial examination yield the greatest [result]; for from his speech and from the firmness or hesitancy with which a person says something, or from that reputation which everyone has in his own *civitas*, there come to light revelations of the truth. 6. Also, in actions concerned with establishing free status, the truth should not be sought by torturing those whose status is at issue.

11 PAUL, *Duties of Proconsul, book 2:* Even if a slave has been returned to the seller, he is not to be tortured in a capital case affecting the buyer.

12 ULPIAN, *Edict, book 54:* If someone, to avoid interrogation under torture, alleges himself to be free, the deified Hadrian has written in a rescript that he is not to be tortured before an action to determine his status has been heard.

13 MODESTINUS, *Rules, book 5:* It is accepted that a slave who has been valued at a particular price is to be put to the torture [only] when there has been a stipulation.

14 MODESTINUS, *Rules, book 8:* A *statuliber* found out in a delict is, in token of his expected freedom, to be punished not as a slave because of his doubtful condition but as a freeman.

15 CALLISTRATUS, *Judicial Examinations, book 5:* Interrogation under torture ought not to be applied to a freeman whose evidence is not inconsistent. 1. Again, the

deified Pius wrote in a rescript to Maecilius that a person under fourteen should not be tortured in a capital case affecting another, especially when the accusation might be completed without outside evidence. It does not, however, follow from this that such [young persons] are to be believed even without torture; for, said [Pius], their age, which is regarded as safeguarding them for the time being against the harshness of torture, makes them also the more suspect of a readiness to tell lies. 2. A person who has given a slave as security to someone who claims ownership [in the slave] is to be regarded as in the position of master, and accordingly [such] slaves can not be tortured in a capital case affecting him, as the deified Pius wrote in a rescript in these words: "You must furnish your case with other proofs; for interrogation under torture must not be applied to slaves when the possessor of the inheritance, who has given security to the plaintiff, is regarded for the meantime as in the position of master."

16 MODESTINUS, *Punishments, book 3:* The deified brothers wrote in a rescript that interrogation under torture may be renewed. 1. A person who has made a confession on his own account shall not be tortured in a capital case affecting others, as the deified Pius wrote in a rescript.

17 PAPINIAN, *Replies, book 16:* It has been agreed that even when a person outside the family is bringing the accusation, slaves may be interrogated [to give evidence] against their master in a question of adultery. The deified Marcus and subsequently our own great emperor have followed this principle in their judgments. 1. However, in a case of *stuprum*, slaves are not tortured [to give evidence] against their master. 2. Where the question is one of substituted birth, or if [someone] is claiming an inheritance whom the other sons allege not to be their brother, interrogation under torture will be applied to the slaves of the inheritance, because the interrogation is not [to provide evidence] against their masters, the other brothers, but concerns the succession to their [former] master who is dead. This agrees with what the deified Hadrian wrote in a rescript; for when one partner was being prosecuted for murdering another, he wrote in a rescript that a slave who was their joint property should be examined under torture, since it seemed that this would be for the benefit of his [dead] master. 3. I gave the opinion that a slave condemned to the mines should not be tortured [to give evidence] against the person who was previously his owner; and that it does not affect the case even if he confesses that he assisted in the crime.

18 PAUL, *Views, book 5:* Where a number of persons are charged with the one crime, they are to be heard in such a way that a beginning is made with the one who is the more afraid or appears to be of tender years. 1. An accused who has been overwhelmed with clearer proofs can be recalled to interrogation under torture, especially if he steels his body and spirit against the pains. 2. In a case where the accused is not hard-pressed by any proofs, tortures should not readily be applied, but the accuser should be urged [himself] to make good and prove true his charges. 3. Witnesses are not to be tortured for the sake of demonstrating falsehood or discovering the truth unless they are alleged to have had a hand in the act. 4. A judge, when he cannot put reliance on the family, will be able to put to the torture slaves of the inheritance. 5. Credence is not given to a slave who confesses something relating to his master of his own accord; for it is not right in matters of doubt for the master's well-being to be entrusted to the whim of his slaves. 6. A slave cannot be interrogated [to give evidence] in a capital case against a master by whom he was sold off and whom he formerly served, in memory of the former ownership. 7. A slave, even if he is offered for torture by his master, is not to be interrogated [in a capital case affecting the master]. 8. Indeed, whenever the question arises of whether slaves are to be interrogated in capital cases affecting their master, [the nature of] his ownership over them must first be investigated. 9. A governor who is about to conduct a hearing into charges should, before the day [of the trial], make it public that he is going to hear the persons in custody, so that persons who need a defense may not be assailed by charges brought suddenly by their accusers; although an accused who requests a defense at

any time should not be denied it, so much so that for that reason persons in custody may [have their appearance] deferred and postponed. 10. Persons in custody can be heard and condemned not only before the tribunal but also outside the court.

19 TRYPHONINUS, *Disputations, book 4:* A person to whom freedom is due under a *fideicommissum* may not be subjected to interrogation as a slave unless and only unless he is accused as a result of the interrogations of others.

20 PAUL, *Decrees, book 3:* A certain husband as his wife's heir was claiming from Surus money which he said the dead woman had lodged with Surus, while he himself was absent, and he had produced a single witness to this, the son of his freedman, before the procurator; he had also sought the interrogation under torture of Surus's handmaid. Surus continued to deny that he had received [the money], and [said] that the testimony of a single person should not be admitted, and that it was not customary to begin with interrogations under torture, even if the handmaid had belonged to a third party. The procurator put the maid to the torture. When the case came to the cognizance of the emperor on appeal, he pronounced that the torture had been conducted unlawfully, that reliance should not be placed on the evidence of one witness, and that therefore the appeal had been rightly lodged.

21 PAUL, *Punishments of Civilians, sole book:* The deified Hadrian wrote in a rescript that no one should be condemned for the purpose of putting him to the torture.

22 PAUL, *Views, book 1:* Persons taken into custody without accusers are not to be subject to torture unless there are any suspicions strongly attaching to them.

19

PUNISHMENTS

1 ULPIAN, *Disputations, book 8:* Whenever an investigation is made into an offense, it is accepted that [the accused] should suffer, not the punishment which his status allows at the time when sentence is passed on him but that which he would have undergone if he had been sentenced at the time he committed the offense. 1. Similarly, if a slave has committed an offense and is said subsequently to have attained his freedom, he ought to undergo that punishment which he would have undergone if he had been sentenced when he committed the offense. 2. On the other hand, too, if someone has been reduced to a meaner status, he ought to suffer that punishment which he would have undergone had he remained in his former status. 3. It is generally agreed that, in terms of the statutes which deal with criminal proceedings or private charges, prefects or governors conducting proceedings *extra ordinem* should impose punishment *extra ordinem* on those who escape a monetary penalty by their lack of means.

2 ULPIAN, *Edict, book 48:* We should understand a person condemned on a capital charge [as condemned] on grounds for which the appropriate [punishment] for the condemned is death or loss of citizenship or slavery. 1. It is agreed that since the time that deportation replaced interdict from fire and water, a person does not lose his citizenship before the emperor has ordered him to be deported to an island; for there is no doubt that a governor does not have the power to deport. However, the urban prefect does have the right of deportation, and immediately after the prefect has passed sentence, [the condemned man] is seen to have lost his citizenship. 2. A person who has not lodged an appeal we shall take to be condemned; but if he should appeal he is regarded as not yet condemned. If, however, a person be condemned by someone who does not have the right to condemn on a capital charge, he is in the same position [as if not yet condemned]. For a man is only condemned where the condemnation was valid.

3 ULPIAN, *Sabinus, book 14:* The punishment of a pregnant woman who has been condemned to death is deferred until she gives birth. Indeed, I know that it is the practice that she is not to be interrogated under torture so long as she is pregnant.

4 MARCIAN, *Institutes, book 13:* Those who have been relegated or deported to an island must stay away from prohibited places. We also use this rule to mean that a relegated

person should depart from forbidden places but should not leave his island; otherwise, a person relegated for a period is punished with permanent exile, someone relegated permanently with relegation to an island, a person relegated to an island with deportation, and someone deported to an island with capital punishment. It is the same if a person does not depart into exile within the time within which he should have gone, or if in any other way he fails to comply with [the terms of] his exile; for his contumacy increases the penalty. Nor can anyone give an exile leave of absence or the parole to return, except the emperor, for special cause.

5 ULPIAN, *Duties of Proconsul, book 7:* The deified Trajan wrote in a rescript to Julius Fronto that in criminal cases a person should not be condemned in his absence. He also wrote in a rescript to Adsidius Severus that neither ought a person to be condemned on suspicion; for it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned. However, judgment ought to be pronounced against contumacious persons who fail to comply with the summonses or edicts of the governors, even in their absence, after the manner of private actions. It is possible to maintain that these principles are not contradictory; what, then, is the answer? It will be better to lay down that penalties involving money or affecting a person's reputation can be imposed on absent persons if, after frequent warnings, they fail [to appear] through contumacy, and this may go so far as relegation; but if there is any heavier penalty to be imposed, let us say condemnation to the mines or capital punishment, it must not be imposed on the absent. 1. For an absent accuser, however, it must be stated that more serious measures are sometimes provided than the penalty imposed by the *senatus consultum Turpillianum.* 2. The words of the rescript [are as follows]. Rightly, Taurinus, have you tempered the penalty on Marus Evaristos in accordance with the degree of his culpability; for it is relevant in more serious offenses whether any act was committed by design or by accident. Indeed, in all charges this distinction must either call forth the penalty of the law or allow mitigation.

6 ULPIAN, *Duties of Proconsul, book 9:* Should anyone, to avoid punishment, happen to say that he has something to tell the emperor concerning his safety, then one must consider whether he should be sent up to the emperor. The majority of governors are so timid that, even after sentence has been passed on the man, they suspend the punishment and do not dare to do anything; others have no patience at all with persons who make any such allegation; while some do not [make it a habit] either always or never to send them up, but inquire what they wish to bring to the notice of the emperor and what they may have to say concerning his well-being, after which they either suspend the punishment or do not. This appears to be the rational middle way. My own view, however, is that once persons have been condemned, they have absolutely no right to a hearing, whatever allegations they make. For who doubts that they have recourse to these [expedients] for the sake of escaping punishment, and that they deserve heavier punishment for having left unsaid so long that which they claim to have to say concerning the emperor's well-being? For they ought not to have been silent for so long over so important a matter. 1. If the proconsul finds that certain slaves of his staff or of his legate are guilty, should he impose punishment on them or reserve them for his successor? There are extant, however, many precedents [showing] that [governors] have punished not only the slaves of their officials and those who act under them, but even their own slaves; something which should indeed be done so that, deterred by this example, they may the less offend. 2. We must now set out the classes of punishment that the governors may inflict on someone. Now there are certain punishments that may take away life, or inflict slavery, or deprive of citizenship, or include either exile or corporal punishment,

7 CALLISTRATUS, *Judicial Examinations, book 6:* (such as *admonitio*, or beating with rods; *castigatio*, or a lashing; *verberatio*, or a flogging with chains)

8 ULPIAN, *Duties of Proconsul, book 9:* or a fine with infamy, or a degradation from a rank, or the forbidding of a particular action. 1. Life is taken away if, say, a person is condemned to be put to death with the sword. But it must be punishment by the sword; for governors do not have the right of killing by the ax, or the javelin, or the club, or the noose, or in any other manner, much less by poison, in the same way that they do not have the right to allow a free choice of death. However, the deified brothers wrote in a rescript allowing a free choice of death. 2. Enemies [of the state] and also deserters to the enemy are punished by being burned alive. 3. Nor should anyone be condemned to death by flogging, or scourging, or by torture, although very many happen to die while being tortured. 4. There is punishment which takes away freedom; of this kind is, say, condemnation to the mines or the *opus metalli*. Mines are numerous, some provinces possessing them and others not; those that have not send [their condemned criminals] to those that have. 5. In a letter of the deified Severus to Fabius Cilo, it is clearly stated that the urban prefect has a special competence to condemn persons to the mines. 6. The only difference between those condemned to the mines and those to the *opus metalli* lies in their chains, that those condemned to the mines are weighed down with heavier chains and those to the *opus metalli* with lighter, and that any who abscond from the *opus metalli* are handed over to the mines, [while those who abscond] from the mines are more severely punished. 7. It is customary for anyone condemned to forced labor who absconds to be condemned to a double term; but the term doubled should be that which he would have had left to serve when he ran away, and, indeed, the term is not doubled from the time when he was arrested and imprisoned. And if he was condemned to ten years, his sentence should either be extended to life, or he should be transferred to the *opus metalli*. Clearly, if he was sentenced to a ten-year term and immediately ran away at the outset, one must consider whether the period is to be doubled, or extended to life, or whether he is to be transferred to the *opus metalli*; and the prevailing view is that he should be transferred, or sentenced to life. For it is generally said that, where a doubling [of the sentence] would take the period beyond ten years, the penalty should not be limited in time. 8. Women are customarily condemned to the service of convicts in the mines, either permanently or for a period; in a similar manner [they may be condemned] to the saltworks. If, indeed, they are sentenced in perpetuity, they are made, as it were, *servae poenae*; but if they are sentenced for a fixed period, they retain their citizenship. 9. Governors are in the habit of condemning men to be kept in prison or that they might be kept in chains, but they ought not do this; for punishments of this type are forbidden. Prison ought to be employed for confining men, not punishing them. 10. Persons are also customarily condemned to the lime quarries or to the sulphur mines; these punishments, however, are heavier than [condemnation] to the [ordinary] mines. 11. We must see whether all those who have been condemned to the hunting games are made *servi poenae*; of course, it is customary for the younger men to suffer this punishment. Therefore, we must see whether these are made *servi poenae* or whether they retain their freedom. The prevailing view is that they too are made *servi* [*poenae*]; for they only differ from the others in this, that they are set to be huntsmen or Pyrrhic dancers or [to provide] some other kind of pleasure by pantomime or other movements of their bodies. 12. There is no doubting that slaves are customarily condemned to the mines, or to the *opus metalli*, or again to the hunting games; and if they are handed over [for these] they are made *servi poenae* and will no longer belong to him whose property they were before their condemnation. In point of fact, when a certain slave, after being condemned to the mines, had been delivered from that punishment by the favor of the emperor, the Emperor Antoninus very correctly stated in a rescript that because the slave had ceased to be his master's property once he was made a *servus poenae*, he should not thereafter be returned to [that]

master's power. 13. If, however, a slave is condemned to fetters, whether permanently or temporarily, he remains the property of him who was his master before he was condemned.

9 ULPIAN, *Duties of Proconsul, book 10:* It is the practice for governors also to forbid [people] to act as advocates. Sometimes they forbid them permanently, sometimes for a fixed period, measuring that period either by years or by the term for which they govern the province. 1. A person can also be forbidden in such terms as to prevent his representing specified persons. 2. He can again be forbidden to plead before the governor's court, but not prohibited from conducting cases before the legate or the procurator. 3. If, however, he is forbidden to plead before the legate, I think that in consequence he will also have lost the right to plead before the governor. 4. Sometimes a person will be forbidden, not [just] the right to act as advocate, but the [entire] practice of law. It is a more serious business to forbid the practice of law than [to forbid] acting as an advocate, if, indeed, a person is absolutely prohibited from engaging in legal business. It is customary [as a penalty], however, to prohibit in this way law students, advocates, and those who draw up documents, or draftsmen. 5. They are customarily forbidden to frame any kind of legal documents, to draw up petitions, or to seal depositions. 6. It is also customary [to forbid them] to sit in any place where legal documents are publicly deposited, for example, a public record office or registry. 7. Again, it is customary [to forbid them] to draw up, write, or sign wills. 8. There will also be this penalty, that a person may not take part in public business; for in this case, he is able to take part in private business but prohibited from public, as are customarily those on whom sentence is passed δημοσίων ἀπέχεσθαι (to abstain from public affairs). 9. There are also other punishments: Someone may be ordered to abstain from commerce, or to take on one of those contracts which are let publicly, such as the *vectigalia publica.* 10. It is common to forbid persons [to engage in] a commercial transaction or transactions; but let us see whether one can condemn someone to take on a transaction. Punishments of this kind, if one wishes to treat the subject in general terms, are indeed contrary to the *jus civile* in ordering an unwilling man to do something which he cannot do; but to deal with the subject specifically, there can be just reason for compelling someone to [take on] a transaction; and if this be the case, the sentence must be followed. 11. These are in general the punishments which are customarily imposed. You must know, however, that there are distinctions between punishments, and not all persons can have the same one imposed on them. To begin with, decurions cannot be condemned to the mines or to the *opus metalli* nor subjected to the gallows nor burned alive. If, by chance, they are so sentenced, they must be freed. This, however, cannot be done by the person who pronounced sentence, but the matter must be referred to the emperor so that the penalty may be altered or remitted by his authority. 12. The parents and children of decurions are also in the same position. 13. We should take "children" to mean all their children, not only their sons. 14. We must, though, see whether only those children whom they have had after [their admission to] the decurionate are exempt from these punishments, or all their children, even those whom they had when their family was of inferior rank. I think the better view is that they all have this privilege. 15. Clearly, if the father ceases to be a decurion, any child born while he was still a decurion will have the privilege of not being [so] punished; however, should a man have a son after he has become of lower rank, that son will be liable to punishment as the son of one of lower rank. 16. The deified Pius wrote to Salvius Marcianus in a rescript that a *statuliber* should be punished as a freeman.

10 MACER, *Criminal Proceedings, book 2:* In the case of slaves, the rule is observed that they are punished after the fashion of men of low rank. For the same reasons that a freeman is beaten with rods, a slave is ordered to be beaten with lashes and returned

to his master; and for those [reasons] that a freeman, after being beaten with rods, is handed over to forced labor, a slave, under the punishment of fetters for the whole of that time, is ordered to be lashed and returned to his master. If he is ordered, being under the penalty of fetters, to be returned to his master but is not taken back by him, he is ordered to be sold and, if he does not find a buyer, to be handed over to forced labor in perpetuity. 1. If any who have been sent to the mines for some reason have committed an offense thereafter, it is right to deal with them simply as men condemned to the mines although they have not yet been dispatched to the place where they have to labor; for they change their status as soon as sentence is passed on them. 2. In the case of all persons, men of inferior rank as much as decurions, it is laid down that he who is inflicted with a heavier punishment than the statutes lay down does not become infamous. Therefore, if someone has been punished with a temporary spell of forced labor, or simply beaten with rods, then even if the action involves infamy, such as an action for theft, he must be said not to be infamous, because one single stroke of the rods is more serious than condemnation to a fine.

11 MARCIAN, *Criminal Proceedings, book 2:* It is for the judge to see that a sentence more severe or lighter than the case demands is not passed; for he should not strive for a reputation either for severity or for clemency, but should sentence with considered judgment, as each case demands. Clearly, in cases of less seriousness, judges should be more prone to leniency, while with more serious penalties they should conform to the severity of the statutes, tempered by kindliness. 1. Domestic thefts, if of a more trifling kind, should not be the subject of public actions, nor should an accusation of this kind be permitted, where a slave is handed over for interrogation under torture by his master, or a freedman by the patron in whose house he lives, or a hired worker by the man to whom he has hired his services; for the term "domestic thefts" is used for pilfering by slaves from their masters, or freedmen from their patrons, or hired workers from those in whose houses they live. 2. An offense is committed by design, by impulse, or by accident. Robbers who form a gang offend by design; those who drunkenly resort to fists or swords, by impulse; while a javelin launched at a wild beast in the course of a hunt which kills a man does so by accident. 3. Capital punishment is to be thrown to the beasts or to suffer other punishments of the same kind, or to be executed [by the sword].

12 MACER, *Duties of Governor, book 2:* So far as the status of the condemned is concerned, it makes no difference whether their trial is public or not; for regard is paid solely to the sentence, not to the nature of the charge. Therefore, those ordered to execution or who are given to the beasts forthwith become *servi poenae.*

13 ULPIAN, *Appeals, book 1:* Nowadays [a judge] who is hearing a criminal case *extra ordinem* may lawfully pass what sentence he wishes, whether heavier or lighter, provided only that he does not exceed what is reasonable in either direction.

14 MACER, *Military Law, book 2:* Certain offenses, which bring no penalty, or a relatively light one, on a civilian, [are visited] more heavily on a soldier. For Menander writes that if a soldier takes part in stage plays or permits himself to be sold into slavery, he should suffer capital punishment.

15 VENULEIUS SATURNINUS, *Duties of Proconsul, book 1:* The deified Hadrian forbade the capital punishment of any who were classed as decurions, save for those who had killed their parents; and indeed it is very fully provided in [imperial] mandates that they are to be punished with the penalty of the *lex Cornelia.*

16 CLAUDIUS SATURNINUS, *Penalties of Civilians, sole book:* There are punishments for things done, such as thefts and killings, or for things said, such as insults or false pleadings, or for things written, such as forgeries and libels, or for things counseled, such as conspiracies and the guilty knowledge of robbers; and the scale of the crime is the same for those who aid others by advice. 1. These four categories, however, must be considered in seven aspects: the motive, the person, the place, the time, the quality, the quantity, and the outcome. 2. The motive: for example, flogging, which goes unpunished if administered by a magistrate or parent, because it is inflicted for the purpose of correction not for the sake of insult; but it is punished when someone has been beaten up in anger by an outsider. 3. The person is looked at in two ways: the person who did the act and the person who suffered [it]; for slaves and freemen are punished differently for the same crimes, and differently, too, someone who dares [to wrong] a master or parent as opposed to an outsider, or who [offends]

a magistrate as opposed to a private person. In considering this matter, regard must also be had to age. 4. Place affects whether the same offense is theft or sacrilege and whether it calls for capital punishment or some lesser penalty. 5. Time distinguishes someone who absents himself without leave from a deserter, and a housebreaker or daytime thief from a thief by night. 6. Quality is when the act is either more or less grave, as manifest thefts are customarily distinguished from nonmanifest thefts, brawls from highway robbery, plundering from theft, impudence from violence. On this subject, Demosthenes, the greatest of the Greek orators, says as follows [in Greek]: "It was not then the blow which caused anger, but the dishonor; for what is terrible to freemen is not being beaten, although this is terrible, but the insult [of being beaten]. Gentlemen of Athens, the man who strikes the blow might do many things which the victim could not even report to a third party: by his manner, by his look, by his voice, as conveying an insult, as being an enemy, [hitting him] with his fist or open-handed. It is these things that move, that drive out of their minds, men who are themselves unused to contumely." 7. Quantity distinguishes a thief from a rustler; for the man who steals a single pig will be punished as a thief, he who steals a herd as a rustler. 8. The outcome is to be considered, even if [the act] was done by a most inoffensive man, although the law punishes the man who is in possession of a weapon for the purpose of homicide no less than him who kills. Therefore, also among the Greeks accidental happenings were expiated by voluntary exile, as is written by the archpoet [Homer]:

> Me, when a child, Menoitius from Opys
> led to your house, for miserable murder
> on the day when I, foolish, inadvertent,
> killed Amphidamas' son, angry over dicing.

9. It happens that the same crimes are punished more severely in certain provinces, for example, harvest-burners in Africa, those [who set light to] vines in Mysia, and those who debase the coinage where there are mines. 10. It sometimes happens that the penalties for some crimes are made tougher, [for example] whenever the excessive numbers of persons engaged in highway robbery need a lesson.

17 MARCIAN, *Institutes, book 1:* Some [convicts] are *servi poenae* such as those sent to the mines or to the *opus metalli*; and if anything is left to them in a will, it is treated as though it had not been written, as if it had been left not to Caesar's slave but to a *servus poenae.* 1. Again, some people are "stateless," that is, without a *civitas*, like those handed over for forced labor in perpetuity and those deported to an island, so that they have no rights under the *jus civile* but retain those which are of the *jus gentium.*

18 ULPIAN, *Edict, book 3:* No one is punished for thinking.

19 ULPIAN, *Edict, book 57:* Should slaves not be defended by their masters, they are not taken away for punishment on the spot, but will be allowed to be defended even by a third party, and [the judge] conducting the trial must inquire into their innocence.

20 PAUL, *Plautius, book 18:* If a penalty is imposed on anyone, it is accepted by a legal fiction that it is not to pass on to his heirs. The reason for this appears to be that punishment is laid down to correct men; and it ceases with the death of him on whom it is imposed.

21 CELSUS, *Digest, book 37:* Death is the only meaning we have for the extreme penalty.

22 MODESTINUS, *Distinctions, book 1:* Persons condemned to the mines, if they are found to be unfit for doing the work because of sickness or the infirmity of age, under a rescript of the deified Pius, can be released by the governor, who will consider their release provided only that they have relatives, by blood or marriage, and have served not less than ten years of their sentence.

23 MODESTINUS, *Rules, book 8:* If, through the inexperience of the person awarding [sentence], someone is sent to the mines without a predetermined time limit, is seems that his sentence is limited to ten years.

24 MODESTINUS, *Encyclopaedia, book 11:* We must know that persons who have been relegated or deported on the ground of treason are to have their statues pulled down.

25 MODESTINUS, *Encyclopaedia, book 12:* If anyone has been under accusation for a long time, his punishment is to be lightened to some extent; and it is so laid down, that those who have long lain under accusation are not to be punished in the same manner as those who receive their sentence promptly. 1. No one can be condemned to be thrown from the [Tarpeian] rock.

26 CALLISTRATUS, *Judicial Examinations, book 1:* The crime or punishment of the father cannot inflict any stain on the son; for each individual suffers his fate for his own crime, nor is he made the successor to the offense of another; as the deified brothers wrote in a rescript to the citizens of Hierapolis.

27 CALLISTRATUS, *Judicial Examinations, book 5:* The deified brothers wrote in a rescript to Arruntius Silo that it was not customary for provincial governors themselves to rescind the sentences pronounced by them. They also sent a rescript to Vetina Italicensis that no one could vary the sentence given by himself, and that this had become unusual. If, however, a person misrepresents himself or, lacking the documentary proof which he discovers later, has been sentenced to punishment, there are extant a number of imperial rescripts in which either the punishment of such persons is reduced or their original status is restored. This, however, can be done only by the emperors. 1. As to decurions and leading citizens of *civitates* who commit capital offenses, it is provided in mandates that if one of them should appear to have committed an offense for which he should be relegated to an island outside his own province, a letter must be sent to the emperor with a note of the sentence passed by the governor. 2. In another chapter of the mandates it is provided in the following words: "If any of the leading citizens of any *civitas* commit brigandage or any other crime such that they appear to have deserved the death penalty, you are to keep them in fetters and to write to me, adding what each of them has committed."

28 CALLISTRATUS, *Judicial Examinations, book 6:* The stages of capital punishments are more or less as follows. The extreme penalty is held to be condemnation to the cross. There is also burning alive; this, however, though deservedly included in the term "extreme penalty," is yet regarded as following after the first, because this class of punishment was devised at a later time. Also there is beheading. Then, the next punishment after death is sentencing to the mines; after that, deportation to an island. 1. The remaining punishments relate to a person's reputation, not to the risk of his *caput*, such as relegation, for a period or permanently, or to an island, or when someone is handed over to forced labor, or punished by beating with rods. 2. It is not the custom for all persons to be beaten with rods, but only freemen of the poorer classes; men of higher status are not subject to beating with rods, as is specifically laid down in imperial rescripts. 3. Certain persons, who commonly call themselves "the lads," in certain towns where there is unrest play to the gallery for the applause of the mob. If they do no more than this and have not previously been admonished by the governor, they are beaten with rods and dismissed, or also forbidden to attend public entertainments. But if after such correction they are caught doing the same again, they should be punished with exile; or sometimes capital punishment may be imposed, for example, when they have too often been guilty of seditious and riotous behavior and after repeated arrests and over-lenient treatment persist in the same rash attitude. 4. It is the custom for slaves, after they have been beaten, to be returned to their masters. 5. If I may speak in general terms, all those who are forbidden to be beaten with rods must have the same respect for their rank [shown to them] as decurions have; for it is inconsistent to say that anyone whom the imperial constitutions forbid to be beaten with

rods may be sent to the mines. 6. The deified Hadrian wrote a rescript in these words: "No one should be condemned to the *opus metalli* for a fixed time, but anyone who is condemned for a period, even if he does the task of a mineworker, should not be regarded as condemned to the mines; for he retains the freedom which those condemned to forced labor in perpetuity lose." Similarly, women condemned in this manner give birth to free children. 7. It is forbidden to flee for refuge to the statues or pictures of the emperors to the injury of another. For since the laws confer freedom from fear equally on all men, taking refuge at the emperors' statues or pictures is rightly seen as intended to injure another rather than to protect oneself, unless someone held in chains or under guard by the *potentiores* flees to protection of this kind; for these [persons] are to be given pardon. The senate has resolved that no one is to flee for refuge to statues or pictures; and the deified Pius wrote in a rescript that a man who had exhibited Caesar's picture to arouse the enmity of another was to be confined in the public prison. 8. All crimes against a patron, or the son, father, near relative, husband, wife, or other connections of a patron, are to be punished more severely than those against outsiders. 9. Poisoners are to suffer capital punishment or, if regard must be had to their rank, deported. 10. Footpads who do it for the sake of loot are regarded as very close to brigands; and if they set out to attack and rob with swords, they suffer capital punishment, especially if they have committed the act repeatedly and on footpaths; others are condemned to the mines or relegated to islands. 11. Slaves who have conspired against the wellbeing of their masters are generally burned in the fire, as sometimes also are free plebeians and persons of low rank. 12. Arsonists who start fires within a built-up area for enmity or for gain are subject to capital punishment; generally, they are burned alive. But those who [burn] a cottage or farm [are punished] somewhat more lightly. Accidental fires, if, when they could have been avoided, they have caused damage to the neighbors through the negligence of those on whose property they started, are the subject of civil actions (in such a way that the person who suffered the loss decides on the damages) or punished only moderately. 13. Degrees of punishment for exiles were laid down by an edict of the deified Hadrian; so he who has been relegated for a period, if he returns [prematurely], is relegated permanently; he who has been relegated permanently, if he returns, is relegated to an island; one relegated to an island, if he escapes, is deported to an island; while he who gets away after deportation suffers capital punishment. 14. So also, as the same emperor wrote in a rescript, must a scale be observed for persons in custody, so that persons who had been condemned [to forced labor] for a period and had escaped were condemned permanently; those condemned permanently were condemned to the mines; those who, after condemnation to the mines, committed [an escape], suffered the extreme penalty. 15. The practice approved by most authorities has been to hang notorious brigands on a gallows in the place which they used to haunt, so that by the spectacle others may be deterred from the same crimes, and so that it may, when the penalty has been carried out, bring comfort to the relatives and kin of those killed in that place where the brigands committed their murders; but some have condemned these [criminals] to the beasts. 16. Our ancestors, whatever the punishment, penalized slaves more severely than freemen, and notorious persons more than those of unblemished reputation.

29 GAIUS, *Lex Julia et Papia, book 1:* Those condemned to the extreme penalty immediately lose their citizenship and their freedom. This fate therefore anticipates their death, sometimes by a long period, as happens in the persons of those who are condemned to the beasts. Again, it is often the custom for them to be kept [alive] after their condemnation, so that they may be interrogated under torture against others.

30 MODESTINUS, *Punishments, book 1:* If anyone does anything whereby men's light minds are frightened by superstitious awe, the deified Marcus wrote in a rescript that persons of this kind are to be relegated to an island.

31 MODESTINUS, *Punishments, book 3:* The governor should not, at the whim of the people, discharge persons who have been condemned to the beasts; but if they are of such strength or cunning that they can worthily be exhibited to the populace of Rome, he should seek the advice of the emperor. 1. The deified Severus and Antoninus wrote in a rescript that condemned persons should not be transferred from one province to another without the emperor's permission.

32 ULPIAN, *Edict, book 6:* If a governor or judge gives an interlocutory judgment: "You have committed *vis*," arising out of an interdict, the accused will not be branded [with infamy], nor will the penalty of the *lex Julia* follow; if, however, he does so arising out of a [criminal] charge, it is another matter. What if the governor fails to distinguish between the *lex Julia* on *vis publica* and the *lex Julia* on *vis privata*? That will have to be considered then in the light of the charge. However, if charges have been brought under both statutes, the milder, that is, the statute on *vis privata*, shall be followed.

33 PAPINIAN, *Questions, book 2:* The imperial brothers wrote in a rescript that slaves condemned to temporary imprisonment may, when they have served their time, obtain their freedom and an inheritance or legacy; for punishment imposed for a period by a [court] sentence purges the penalty. If, however, the gift of liberty were to find them while they are actually in prison, the principle of the law and the words of the constitution thwart their freedom. Clearly, if a slave is granted liberty in a will and at the moment at which he enters upon the inheritance his time of imprisonment has elapsed, he will rightly be regarded as manumitted, just as if a debtor should have manumitted a slave given as a pledge and his inheritance had been entered upon after the redemption of the pledge.

34 PAPINIAN, *Replies, book 16:* A slave is not handed over to forced labor in perpetuity, much less for a set period. Accordingly, when through a mistake a slave had been handed over to [forced] labor for a period, I gave the opinion that at the expiry of that period he should be returned to his master. 1. I also gave the opinion that in terms of the spirit of the *senatus consultum*, those who instigate an accuser through the agency of a man of straw are liable to the accuser's penalty.

35 CALLISTRATUS, *Questions, book 1:* In the mandates given by the emperors to provincial governors, it is provided that no one is to be condemned to permanent imprisonment; and the deified Hadrian also wrote a rescript to this effect.

36 HERMOGENIAN, *Epitome of Law, book 1:* Those condemned to the mines, as also to the service of the mineworkers, are made slaves, that is, *servi poenae*.

37 PAUL, *Views, book 1:* It is agreed that commodity hoarders may be punished *extra ordinem* according to the degree of their crime because of the false size of their measures; this is for the benefit of the people's corn dole.

38 PAUL, *Views, book 5:* If anyone has stolen anything from an imperial mine or from an imperial mint, he is punished by the penalty of [being sent to] the mines and exile. 1. Deserters to the enemy or those who betray our counsels are either burned alive or hanged on the gallows. 2. Those who are responsible for sedition and disturbance when a mob has been excited are, according to their social standing, either hanged on the gallows or thrown to the beasts or deported to an island. 3. Those who seduce underage virgins, if they are of lower rank are condemned to the mines, if of higher status, relegated to an island or sent into exile. 4. [A slave] who fails to prove that he has bought his freedom with his own money cannot claim his freedom; further, he is returned to the same master under penalty of fetters or, if the master himself prefers, condemned to the mines. 5. Those who administer an abortifacient or aphrodisiac draught, even if they do not do so with guilty intention, are still condemned, because the deed sets a bad example, if of lower rank to the mines, if of higher status to relegation to an island with the forfeiture of part of their property. But if for that reason a man or woman dies, they suffer the extreme penalty. 6. A will which is not according to law is suppressed without penalty; for there is nothing which may be

claimed under or based upon it. 7. Anyone who opens, recounts, or unseals the will of a person in his lifetime is liable to the penalty of the *lex Cornelia*; and generally those of lower rank are condemned to the mines; those of higher status, deported to an island. 8. If anyone proves that a document [relevant to] his lawsuit has been revealed by his procurator to his opponent, the procurator, if he is of lower rank, is condemned to the mines, if of higher status, forfeits half his property and is relegated permanently. 9. If anyone with whom documents have been deposited returns them to someone else in [the depositor's] absence or betrays them to his opponent, he is condemned to the mines or deported to an island according to his personal standing. 10. If judges delegate are alleged to have been corrupted with money, they are generally either removed from [their] court or sent into exile or relegated for a fixed period by the governor. 11. A soldier who has broken out of prison after being given a sword suffers capital punishment. Someone who has deserted along with the man whom he was guarding is liable to the same penalty. 12. A soldier who has attempted suicide but has not carried it through must suffer capital punishment, unless he did so because of unbearable pain or sickness or some sort of grief or for some other cause in which case he is to get a dishonorable discharge.

39 TRYPHONINUS, *Disputations, book 10:* Cicero, in his speech *pro Cluentio Habito*, wrote that when he was in Asia a certain woman of Miletus had been condemned for a capital offense because, after taking money from the substituted heirs, she herself aborted her own child with drugs. But if [a woman], because she is pregnant, does violence in some way to her womb after her divorce so as to avoid giving a son to her husband who is now hateful, she is to be punished by temporary exile, as has been written in a rescript by our most noble emperors.

40 PAUL, *Decrees, book 3:* It was decided to deport Metrodorus to an island, since he knowingly harbored a fleeing enemy, and to relegate Philoctetes to an island because, though he knew the man was being concealed, he kept the matter quiet for a long time.

41 PAPINIAN, *Definitions, book 2:* The sanction of the statutes, which in most recent times imposes a fixed penalty on those who fail to comply with the provisions of a statute, is not seen as applying to those special cases to which a penalty is specifically attached by the statute itself. There is no doubt that in all other [aspects] of the law the particular derogates from the general, nor indeed is it likely that a single offense should be punished on different assessments under the same statute.

42 HERMOGENIAN, *Epitome of Law, book 1:* In the interpretation of the statutes punishments should be mitigated rather than made harsher.

43 PAUL, *Replies, book 1:* The Emperor Antoninus wrote in a rescript to Aurelius Atilianus: "A governor cannot forbid anyone to practice his profession beyond the term of his own administration." 1. The same [emperor] gave the opinion that a person who by his own crime has lost the status of a decurion cannot claim the status of a decurion's son to avoid punishment.

20

PROPERTY OF CONDEMNED PERSONS

1 CALLISTRATUS, *Law of the Imperial Treasury and the People, book 1:* On [a man's] condemnation to lose life or citizenship or to be reduced to slavery, [his] property is confiscated. 1. Although [children] conceived before but born after condemnation take their portions from the property of their condemned fathers. 2. However, children

are granted their portion only if they are born of a *jus civile* marriage. 3. The children of a person who has forfeited only one half of his property are not given their shares [in the other half], as was written in a rescript by the deified brothers.

2 CALLISTRATUS, *Judicial Examinations, book 6:* Someone should not be stripped when he is put in prison but [only] after his condemnation, as the deified Hadrian wrote in a rescript.

3 ULPIAN, *Edict, book 33:* A woman's dowry is confiscated if she is condemned under [one of] five statutes: treason, *vis publica*, parricide, poisoning, and murder.

4 PAPINIAN, *Adulterers, book 2:* And the husband has all his rights of action intact against the imperial treasury absolutely.

5 ULPIAN, *Edict, book 33:* If, however, she receives capital punishment under another statute under which her dowry is not confiscated because she is first made a *serva poenae*, it is true that her dowry falls to her husband's gain as if she had died. 1. But if a daughter-in-power is deported, Marcellus says, and his opinion is correct, that the marriage is not in any case dissolved by the deportation; for since the woman remains free, there is nothing to prevent the man from keeping his husbandly affection and the woman her wifely spirit. But if the woman is of a mind to leave her husband, then, says Marcellus, her father will bring an action for the [return of her] dowry. If, however, she is a *mater familias* and is deported during the existence of the marriage, her dowry remains in the keeping of her husband; but if the marriage is afterward dissolved she can from considerations of humanity bring an action [for its return], as if the action had arisen today.

6 ULPIAN, *Duties of Proconsul, book 10:* The deified Hadrian wrote in a rescript to Aquilius Bradua as follows: "The explanation of [the term] 'old clothes' so far as it need be understood, is apparent from the name itself. For it would not be a correct use of words to say that the property of condemned persons means their old clothes, nor if someone has a belt around himself, ought anyone [else] to claim it straightway for himself; but [the term covers] the clothes the [condemned] is wearing or the small change in his moneybelt that he has for his subsistence, or rings of small worth, that is stuff which does not exceed [the value of] five aurei. Otherwise, if a condemned man has on his finger a sardonyx or some other costly jewel or if he has in his pocket a bond for a large sum of money, he will have no right to keep it under the heading of 'old clothes'." Old clothes are those things which a man taken into custody has brought along with him; the garments in which a man is dressed when he is led off for punishment, as the name itself shows. So neither may torturers claim these things of their own accord for themselves, nor their assistants ask for them, from those being stripped at the moment of execution; and governors ought not to turn this sum to their own profit, nor allow their junior staff or accounts clerks to misuse [such] money, but they must retain it for those purposes for which governors may lawfully incur expenditure, say, to provide certain officials with money for stationery, or to reward soldiers if they have performed bravely, as also to make a present to barbarians visiting them on an embassy, or for some other purpose. Frequently, also governors pass on money scraped together from this source to the imperial treasury; but this is really excessive zeal, since it is enough if [the governor] refrains from converting it to his own uses and allows it to be employed for the benefit of his office.

7 PAUL, *The Portions Which Are Permitted to Children of Condemned Persons, sole book:* Since natural reason, like a sort of unspoken law, would award children an inheritance from their parents, as if by summoning them to their due succession (for which reason also in the *jus civile* the name *sui heredes* is attached to them, and they cannot be removed from the succession even by the wish of the parent except for good reasons); the most equitable view is that in that event also, when the condemnation of a parent takes away his property by way of punishment, regard is had for the children, so that those untouched by blame may not pay too heavy a penalty for another's crime, sometimes being reduced to the direst poverty. It has been agreed that limits be set on a reduced scale so that those who were due to come into the whole [inheritance] under the law of succession should have shares allowed them from it. 1. If a freedman is executed, his patron should not be deprived of that part of his [freedman's] property which he would have received had the person executed died a natural death; the remainder of the property, which does not belong to the manumitter, shall be claimed by the imperial treasury. 2. It is equitable to grant shares in the property of the condemned to adoptive children no less than natural ones, unless the adoption was made for fraudulent purposes. An adoption is regarded as having been made for fraudulent purposes if someone, even if not [yet] under accusation but in desperation because of his knowledge of the situation, adopts another in fear of an impending accusation so that the [adopted person's] share may be deducted from the property which he expects to lose. 3. Should the condemned man have more than one son, examples are cited of all the property of the condemned being granted to the several children. And the deified Hadrian wrote in a rescript to this effect: "The number of children of Albinus's sons has made a favorable impression on me, since I prefer the empire to be increased by the addition of men rather than by abundance of money; and, therefore, I wish them to be granted their paternal property, which will very little enrich so many possessors, even if they take the whole." 4. Furthermore, the shares of the children are not augmented by what their condemned [father] obtained through his crime, for example, if he had contrived the death of a relative and entered on his inheritance or taken *bonorum possessio*; for so the deified Pius wrote in a rescript. Consequently, the same emperor laid down that when a daughter-in-power was convicted for poisoning him who had instituted her his heir, although it was at the command of her father in whose power she was that she had entered on the inheritance, it should still be claimed for the imperial treasury. 5. Property acquired after his condemnation by someone whose property is forfeit belongs, if he is relegated, to his heirs written or intestate; for a person relegated to an island has the capacity to make a will, as also his other rights [as a citizen]. But if he is deported, then, because of his loss of citizenship, he cannot have an heir, and the imperial treasury takes even those things that he acquired subsequently.

8 MACER, *Criminal Proceedings, book . . . :* The right of patronage is preserved intact for the children of patrons in respect of the confiscated property of a freedman of

their father. If there is a surviving son of the patron of that freedman, the imperial treasury has no claim on the share of the patron's son. 1. If the patron's son is excluded by the freedman's own children, it is better to say that the imperial treasury has no claim, because the freedman's children exclude the patron's son, while he in turn bars the imperial treasury. 2. There is no doubt that the patron's son, even if he does not seek *bonorum possessio*, excludes the imperial treasury from that share of the property of his father's freedman that is due to him. 3. The property of someone who is relegated can be confiscated by a specific sentence, but, however, his rights as against his freedmen are not taken from him except by order of the emperor. 4. If a father is condemned after giving a dowry for his daughter, the imperial treasury has no right to that dowry, even if the daughter later dies during her marriage,

9 CALLISTRATUS, *Fiscal Law, book . . . :* unless it is proved that the father had provided for his children out of fear of condemnation.

10 MACER, *Criminal Proceedings, book . . . :* Even if a father is condemned after promising a dowry for his daughter, her husband may claim it from the imperial treasury out of [the father's] property. 1. If the father is condemned after the dissolution of his daughter's marriage, then, if after [this] she gave him her consent to seek the return of the dowry, it is the imperial treasury that seeks it from the husband; if, however, she gave her consent before he was condemned, she herself has the claim for its return.

11 MARCIAN, *Criminal Proceedings, book . . . :* If a condemned person appeals and, while his appeal is pending, dies, his property is not confiscated; for in this case even a later will of his is valid. The position is the same even if his appeal has not been received. 1. A person charged with a crime other than treason can administer his property, lend money, and receive what is owed to him, if his debtors pay him in good faith; however, anything which he has fraudulently alienated is reclaimed after his condemnation.

21

PROPERTY OF PERSONS WHO BEFORE SENTENCE HAVE EITHER COMMITTED SUICIDE OR CORRUPTED THEIR ACCUSER

1 ULPIAN, *Disputations, book 8:* In capital charges, it has been decreed by the emperors that to have corrupted his opponent does not injure the person charged, but

[this applies] only in those [charges] which carry the death penalty; for they have ruled that a man should be pardoned for wanting to save his neck by any means whatsoever.

2 MACER, *Criminal Proceedings, book 2:* "The Emperors Severus and Antoninus to Julius Julianus. It is reasonable that those who, after being informed on by brigands, corrupt their accusers and then die, because they stand confessed of the charge, should leave no defense to their heirs." 1. If a person, concerning whose penalty a letter has been sent to the emperor (for example, because he is a decurion or because he deserves to be deported to an island), dies before a rescript be sent, should he be regarded as having died before sentence? By way of proof, there is a *senatus consultum* passed concerning those persons who, having been sent to Rome, have died before their sentence. Its words are as follows: "Since no one until this year can be regarded as condemned before judgment has been rendered and pronounced on him at Rome, his heirs ought to have possession of the property."

3 MARCIAN, *Accusers, sole book:* Accused persons who have been arraigned or who have been caught red-handed, and have committed suicide from fear of the impending charge, leave no heir. Papinian, however, in the sixteenth book of his *Replies*, has written to the effect that the property of those who lay hands on themselves when they have not been arraigned as defendants on a criminal charge is not forfeited to the imperial treasury; for it is agreed that it is not the wickedness of the deed that is subject to punishment, but that the fear resulting from guilty knowledge is taken in an accused [who commits suicide] to be as if he had confessed. Accordingly, they must either have been arraigned or caught in the act for their property to be confiscated if they kill themselves. 1. As the deified Pius wrote in a rescript, however, the property of a person who has committed suicide while under accusation should be claimed by the imperial treasury only where the charge of which he was accused was such that on condemnation he would have suffered death or deportation. 2. The same emperor wrote in a rescript that a man accused of a moderate theft, even should he have ended his life by hanging himself, did not seem to be in such a case that his property should be taken away from his heirs; for, indeed, the heirs would not have been deprived [of his property] if the theft had been proved against him. 3. Therefore, it must be said that the property of someone who has laid hands on himself is claimed by the imperial treasury if and only if he was implicated in a charge such that if he were convicted he would lose his property. 4. However, the deified Antoninus wrote in a rescript that if someone puts an end to his life through *taedium vitae* or unendurable pain of some kind, or otherwise, he has a successor. 5. The deified Hadrian wrote in a rescript that it appeared that a father, who had laid hands on himself because he was said to have killed his son, had primarily killed himself for grief at losing his son, and that, therefore, his property should not be confiscated. 6. But this distinction is made, that a person's motive for committing suicide is relevant, as when the question is raised of whether a soldier who has attempted suicide but has not carried it through should be punished, as if he carried out sentence on himself. For he should by all means be punished unless he was compelled to do so by *taedium vitae* or unendurable pain of some kind. And it is right that he should be punished if he has laid hands on himself without good cause; for he who has not been merciful to himself will much less be merciful to another. 7. It is laid down in mandates that the property of those persons who die in prison or on bail when the outcome of the case is in doubt is not to be confiscated. 8. If the heirs of a person who has died under accusation, at his own hand and without sufficient prior cause, are prepared to take up the case and demonstrate the innocence of the deceased, should they be given a hearing and the property not seized for the imperial treasury until the charge is proved; or is the property absolutely forfeit? However, the deified Pius wrote in a rescript to Modestus Taurinus that

if the heirs are prepared to take up the defense, the property should not be confiscated unless the charge is proved.

22

PERSONS UNDER INTERDICT RELEGATED AND DEPORTED

1 POMPONIUS, *Sabinus, book 4:* A chapter of the deified Trajan's rescript to Didius Secundus: "I know that by reason of the avarice of former times the property of relegated persons was claimed by the imperial treasury. But it is otherwise agreeable to my clemency, since I have left this example among the others in which I have regulated the integrity of my accounting."

2 MARCIAN, *Institutes, book 13:* The deified Pius wrote in a rescript that a deported person cannot manumit.

3 ALFENUS, *Epitomes, book 1:* [It was written that] a person who lost his citizenship took away no other legal right from his children, except for what would have come to them from him had he died intestate in possession of his citizenship, that is, his inheritance, his freedmen, and anything else of this kind that can be ascertained. Those things which are granted them, not from their father but from their race, their citizenship, or the nature of things, remain for them unimpaired. Therefore, brothers will become *heredes legitimi* to their brothers and will have tutories over and inheritances from their agnates; for these have been given them not by their father but by his ancestors.

4 MARCIAN, *Institutes, book 2:* Persons relegated to an island keep their children in their power, because they keep all their other legal rights, save only that they are not allowed to leave their island. They also keep all their own property except that which has [specifically] been taken away from them; for it is possible for a [judge] by sentence to deprive those who have been sent into permanent exile or relegated of part of their property.

5 MARCIAN, *Rules, book 1:* Exile is of three kinds: prohibition from certain determined places, imposed banishment so that [the exile] is forbidden all places except for one determined place, or a tie to an island, that is, relegation to an island.

6 ULPIAN, *Duties of Proconsul, book 9:* Among punishments is also deportation to an island, a punishment which takes away Roman citizenship. 1. However, provincial governors are not given the right of deportation to an island, although it is given to the urban prefect; for this is expressly stated in a letter of the deified Severus to the urban prefect, Fabius Cilo. Therefore, provincial governors, whenever they think fit to deport anyone to an island, must put this same on record by sending his name in writing to the emperor so that he may be deported to an island; they [must] then write to the emperor having set out all the considerations in such a way that he may decide whether the [governor's] sentence on the man is to be carried out and whether he ought to be deported to an island. In the meantime, however, while the correspondence is going on, [the governor] should order the person to be kept in prison. 2. The deified brothers wrote in a rescript that for capital crimes decurions of *civitates* should be deported or relegated. Finally, they ordered that Priscus, who had been informed on for homicide and arson and had confessed before interrogation under torture, should be deported to an island.

7 ULPIAN, *Duties of Proconsul, book 10:* There are two classes of relegated persons: There are certain persons who are relegated to an island, and there are those who are simply barred from a province, but are not assigned an island. 1. Provincial governors can relegate to an island, but only if they have an island under them (that is, geographically part of the province which they administer), and they can specially assign that island and relegate persons to it; if, however, they do not have [an island], they may still pronounce that they are relegating [someone] to an island and write to the emperor so that he himself may assign an island. But they cannot condemn [someone] to an island which they do not have in the province that they govern. In the meantime, until the emperor assigns an

island, the person relegated is to be handed over to the military. 2. There is this difference between those deported and those relegated to an island, that a person can be relegated to an island both for a period and permanently. 3. Whether he be relegated for a period or permanently he retains his Roman citizenship and does not lose his capacity to make a will. 4. It is shown in certain rescripts that those relegated for a period should not be deprived of either all or part of their property, and the sentences of those [judges] who have deprived persons relegated for a period of their property, or part of it, have been censured, though not to the extent of invalidating the sentences thus passed. 5. There is in the province of Egypt a type of relegation similar to that to an island: to relegate to the [Great] Oasis. 6. But just as no [governor] can relegate to an island which is not under him, so also he has no right to relegate to a province which is not under him; for example, the governor of Syria will not relegate to Macedonia. 7. However, he can relegate outside his own province. 8. Also he can relegate someone so as to stay in a particular part of the province, so that, for example, he is not to go outside a particular *civitas* or leave a particular region. 9. However, I know that governors generally relegate to those parts of a province which are more deserted. 10. The governor can bar someone from the province which he himself rules, but not from another; and the deified brothers wrote in a rescript to this effect. The consequence of this was that a person who had been relegated from the province in which he had his domicile could remain in the place from which he originated. However, our emperor and his deified father have provided for this. For they wrote in a rescript to Maecius Probus, governor of the province of Spain, that a person could also be barred from the province from which he originated by the governor of the province where he had his domicile. It is also proper that persons who, though not residents of a province, commit an offense there, should come under the force of [this] rescript. 11. There has been doubt whether [a governor], while in charge of the province in which the [accused] is resident, can bar him from the province in which he was born, while not barring him from his own [province of domicile], as it is customary to bar persons from Italy without barring them from their own native land; or whether as a consequence [the governor] is held to have barred him also from the province which he is governing [and is the accused's domicile]. And this will be the more approved view. 12. On the other hand, however, [the governor] in charge of the relegated person's province of origin does not acquire the right to bar him from the province where he resides. 13. If [a governor] passes a sentence to the effect that a person who has committed [an offense] in another province can be relegated by the governor in charge of that province, the result will be that the person relegated must stay out of three provinces, apart from Italy: that in which he committed the offense, that in which he resides, and that of his origin. If he appears to have sprung from more than one province, according to his own standing or that of his parent or patrons, we shall say that he is consequently barred from more than one province. 14. Certain governors, however, have the special privilege that they can bar from several provinces, such as the governors of Syria, and of Dacia also. 15. It is laid down that a person barred from his native land must also stay out of Rome; but, on the other hand, if someone is barred from Rome, it does not appear that he is barred from his native land. And it is so laid down in many constitutions. 16. If someone is barred, not indeed from his native land, but from a particular *civitas*, it has to be seen whether we should say that he is barred from his native land and also from Rome; and this is the prevailing view. 17. Governors have the power and the custom of giving persons who are being relegated [so many] days to leave; for it is the habit to pronounce as follows: "I relegate him from this province and its islands; and he must leave by such and such a date." 18. The deified brothers wrote in a rescript that a person relegated could certainly send a written petition to the emperor. 19. Furthermore, it is customary to sentence certain persons to be barred from remaining within the territory of their native land, or within its walls; or that they should not go outside their native land, or should remain in certain villages. 20. It is customary to bar decurions from their *ordo*, either for a period or permanently. 21. It is also possible to impose on someone the punishment that he is not to seek [high] office; this does not mean that he ceases to be a decurion when it is possible for him to be one, but that he is not admitted to high office. For a

man can even be a senator and yet not be able lawfully to seek high office. 22. It is also possible for someone to be barred from a single office in such way however that a man who is barred from one office is unable to seek not only that office but also those which are higher than it; for it is quite ridiculous for a man who is barred from lower offices as a punishment to aspire to higher ones. But a man forbidden the higher offices is not forbidden to seek the lower. If, however, someone be forbidden *munera* by way of punishment, the sentence will be of no effect; for punishment ought not to confer exemption from public duties. Therefore, if someone is barred from office as a punishment, it can be said that, if those offices are involved with the heavy expense of a *munus*, the infamy [imposed] on [the convicted person] will not benefit him on this account.

8 MARCIAN, *Criminal Proceedings, book 2:* But I think that he can be kept from the office, and yet have to meet the expenses.

9 ULPIAN, *Duties of Proconsul, book 10:* The governor can condemn someone not to leave his house;

10 MARCIAN, *Criminal Proceedings, book 2:* but not so as to prevent his making expenditure on the necessities [of life].

11 ULPIAN, *Duties of Proconsul, book 10:* Sometimes a money penalty is imposed on those who harbor relegated persons; sometimes also they themselves are relegated as well, if those others were relegated for a serious crime.

12 MARCIAN, *book . . . :* A person who on being relegated from his native city does not leave is relegated from the province for a period.

13 PAUL, *book . . . :* Someone manumitted by a relegated person may not lawfully remain in Rome, since his patron is not allowed [to remain there].

14 ULPIAN, *book . . . :* A relegated person is one who is barred from a province or the city or the surrounding area, either permanently or for a period. 1. There is a major difference between relegation and deportation; for deportation takes away both citizenship and property, while relegation preserves both, unless there is confiscation of property. 2. Relegation may be carried out by the emperor, the senate, the prefects, and provincial governors, but not by consuls. 3. A person who has lost his citizenship but retains his property is liable to *actiones utiles* by a creditor.

15 MARCIAN, *book . . . :* A deported person loses his citizenship but retains his freedom, and while he loses the *jus civile*, he employs the *jus gentium*. He accordingly buys, sells, leases, hires, barters, lends money, [and does] other things of the same kind. Hence, he may also lawfully pledge those things which he acquired after his condemnation; and in these dealings, his creditors who have contracted with

him in good faith are preferred to the imperial treasury as successors when a deported person has died. A deported person cannot alienate the property which is found [in his possession] at the time of his condemnation. 1. A person deported by a provincial governor without leave of the emperor can both be instituted heir and accept legacies.

16 MARCIAN, *book . . . :* When Ulpianus Damascenus petitioned the emperor that his deported mother be allowed to leave him certain necessaries for his subsistence and the mother also petitioned through her freedman that she should be allowed to leave certain things to her deported son, the Emperor Antoninus sent them a rescript as follows: "It is contrary to custom and public statute that inheritance, legacy, or *fideicommissum* be left by persons of this kind, and it is not proper that their condition should be changed; but because your request has been a dutiful one, I permit you in your last will to leave those persons sufficient for their living and other necessary uses, so that they may take anything which relates to them for those purposes."

17 POMPONIUS, *book . . . :* There is no prohibition on a relegated person's being honored with statues and pictures. 1(18). A relegated person retains his status intact, the property which he has and his power over his children, whether his relegation is for a period or permanent. 2(18, 1). However, deportation is not for a period.

18 (19) CALLISTRATUS, *Judicial Examinations, book . . . :* A relegated person cannot remain in Rome, even if this is not included in his sentence, because it is the common *patria*, nor in a *civitas* in which the emperor is staying or through which he is passing; for only persons who can enter Rome are permitted to look on the emperor, since the emperor is the *pater patriae.* 1. When there is pronounced on freemen a sentence of such a kind that their property is confiscated, such as deportation to an island, then by that sentence itself they lose their previous status and are immediately handed over to the punishments imposed on them by it, unless some connection with treason requires the punishment to be made more severe.

23

THOSE WHO HAVE SERVED THEIR SENTENCE AND BEEN REINSTATED

1 ULPIAN, *Edict, book 38:* A patron who has been deported and reinstated is allowed to inherit from his freedman. 1. But if he be reinstated after condemnation to the mines, would his having been a *servus poenae* extinguish his right of patronage, even after his reinstatement? The prevailing view is that the slavery would not extinguish the right of patronage.

2 ULPIAN, *Opinions, book 5:* If a person reinstated after deportation has recovered his rank by favor of the emperor, he is not, however, [automatically] reinstated in all his property, nor can he be sued by his creditors or in the name of the state. But if, having been offered by the emperor the opportunity of recovering his property as well, he prefers to abandon it and to disembarrass himself of the actions to which he had been liable before his sentence, he cannot do so.

3 PAPINIAN, *Replies, book 16:* The imperial treasury retained the property of a person who had been deported to an island after his punishment had been remitted; it was agreed that his creditors from before the event did not have [rights of] action against him who had formerly been their debtor. But if he also recovers his property along with the grant of reinstatement of his rank, *utiles actiones* will not be necessary, since direct ones are indeed competent.

4 PAUL, *Questions, book 17:* A woman who had been condemned to the mines gave birth to a child whom she had conceived beforehand and was then reinstated by the emperor. It will be more humane to say that the rights of blood relationship [to the child] appear to be restored to her also.

24

DEAD BODIES OF PUNISHED PERSONS

1 ULPIAN, *Duties of Proconsul, book 9:* The bodies of those who suffer capital punishment are not to be refused to their relatives; and the deified Augustus writes in the tenth book of his *de Vita Sua* that he also had observed this [custom]. Today, however, the bodies of those who are executed are not buried otherwise than if this had been sought and granted. But sometimes it is not allowed, particularly [with the bodies] of those condemned for treason. The bodies of those condemned to be burned can also be sought so that the bones and ashes can be collected and handed over for burial.

2 MARCIAN, *Criminal Proceedings, book 2:* If anyone has been deported or relegated to an island, the punishment endures even after his death, nor is it lawful to remove him anywhere else for burial without consulting the emperor, as Severus and Antoninus very frequently wrote in rescripts; and they allowed the same favor to many petitioners.

3 PAUL, *Views, book 1:* The bodies of executed persons are to be granted to any who seek them for burial.

BOOK FORTY-NINE

1

APPEALS AND REFERRALS

1 ULPIAN, *Appeals, book 1:* As everybody knows, the practice of appeals is both frequent and necessary, inasmuch as it corrects the partiality or inexperience of judges; not but what it may sometimes alter well-delivered judgments for the worse, for it is not [necessarily] the case that the last person to pronounce judgment judges better. 1. Is it possible for an appeal to be made against an imperial rescript, if perhaps the provincial governor or some other person consults him and a rescript is sent in reply to that consultation? Does there survive a right of appeal? What, then, if the person who consulted [the emperor] made a false statement? There is extant on this subject a rescript of the deified Pius to the commonalty of the Thracians, in which it is shown that there should be an appeal. The words of the rescript are as follows: "If someone writes something to us, and we send some form of reply to it, those who wish to appeal from that reply will be permitted to do so. For if they shall show that what was written in the letter was false or misrepresented, it will not appear that the case was in any way prejudiced by us in replying to the letter which set out the facts otherwise." 2. Consequent on this, it appears to be laid down by the rescript that there should be no appeal against the judge's consultation, if he does perhaps pronounce an interlocutory judgment that he is going to consult the emperor, since it is possible to appeal after [the issue of] the rescript. 3. If a person makes a mistake in his appeal, as suppose he appeals to one judge when he should have done so to another, we have to see whether the error was at all prejudicial to him. And if, indeed, his mistake was to appeal to a lower judge when he should have appealed to a higher, the error will harm him; if, however, he appealed to a higher judge, the error will be in no way prejudicial to him. This provision is found in many constitutions. Finally, when someone, by rescript of the emperor, had accepted a judge from the consuls and had appealed to the urban prefect, his error was relieved by a rescript of the deified brothers of which the words are as follows: "Since you say that it was through making a mistake that you appealed from the judge, whom you had by our rescript accepted from the most excellent consuls, to our friend Junius Rusticus, the urban prefect, the most excellent consuls may examine the case precisely as if the appeal had been made to them." If, therefore, someone appeals to an equal or a superior judge, but [confuses] one for another, his situation is such that the mistake does not harm him; but if to an inferior judge, it will. 4. The written statement of appeal which is issued should be so drafted as to have written on it both by whom it was delivered, that is, who the appellant is, and against whom and from what judgment.

2 MACER, *Appeals, book 1:* But if someone appeals *apud acta*, it will be sufficient if he says, "I appeal."

3 ULPIAN, *Appeals, book 1:* It has, I know, been asked whether, if someone fails to add to his written statement [of appeal], the name of the opponent against whom he is appealing, he is met by a defense. I think that no [such] defense should lie. 1. This also has come into question if [someone] has a number of opponents, some of whose names are included in the written statement and others not, whether a defense can be made against him by those whose names are not included, just as if he had acquiesced in the judgment so far as they are concerned. I think that since there is a single action, [this] defense should not apply.

2. Certainly, if there are several persons against whom judgment is given, and some of their names are included in the written statement and others not, only those will be regarded as having appealed whose names are included in the written statement. 3. What, then, if he states definite grounds of appeal; is he allowed to depart from them and put forward other grounds; or is he, as it were, bound by one set form? However, I think that when he has once appealed he has freedom to plead his case, even to put forward other grounds of appeal and to pursue his appeal by whatever means he can.

4 MACER, *Appeals, book 1:* An appeal is not allowed from the *exsecutor* of a judgment. 1. An appeal, however, is allowed from a person who is said to have misinterpreted the judgment, provided only that he had the power to interpret it, such as a provincial governor or an imperial procurator, in such a way however that in setting out the grounds of appeal the only point examined is whether the interpretation was according to law. This also was stated in a rescript of the deified Antoninus. 2. A person who has an interest can appeal on the condemnation of someone else. One who has brought and lost [an action] by means of a procurator is such a person; but the procurator may not appeal in his own name. 3. Again, if a buyer fails to obtain ownership, on his yielding the point, his *auctor* can appeal; or if the *auctor* brings an action and loses, the buyer is not to be refused the opportunity of an appeal. But what if a seller, who did not wish to appeal, is not a solvent person? Indeed, and even if the *auctor* appeals but then is seen to be suspect in defending his action, the defense of the action is accordingly to be handed over to the buyer, just as if he himself had been the appellant. 4. This has also been laid down for the case of a creditor when a debtor, after losing his action [against a third party], had appealed and did not defend his action in good faith. This constitution is to be applied if a debtor, having lost concerning a pledge, appeals with the intervention of his creditor; for the debtor creates no prejudice to an absent creditor, and this has been laid down. 5. If a procurator who was present in court has lost, can he himself appeal through a procurator, since it is agreed that one procurator cannot create another? It must, though, be remembered that after joinder of issue, a procurator becomes the principal in the action and on that account he also can appeal through a procurator.

5 MARCIAN, *Appeals, book 1:* It is not possible for there to be an appeal against a judgment passed between other parties, except for just cause, as, for example, if someone allows himself to be condemned to the prejudice of his co-heirs, or some case similar to this (though [the position of] the co-heir is safe even if he does not appeal); again [for example] *fideiussores* on behalf of the person for whom they are sureties. Therefore, the *fideiussor* of the seller will appeal on the buyer's losing his action, even though buyer and seller are content. 1. If a person instituted as heir loses against an opponent bringing the action of an undutiful will, the legatees and those who have received their freedom [in the will] are allowed to appeal if their complaint is that [judgment] was pronounced by collusion, as was stated in a rescript by the deified Pius. 2. The same [emperor] wrote in a rescript that legatees can raise an appeal action. 3. But, indeed, the same is to be said if they allege that a *transactio* was reached to defraud them by the person who had appealed. And there is a rescript to the same effect if the *transactio* took place without an appeal. 4. If someone makes an oral appeal on the same day during the course of court business, this is enough; if, though, he does not do this, there must be reckoned either a two-day or a three-day period for handing in his written statement of appeal.

6 ULPIAN, *Appeals, book 2:* It is not only the person who is being led off to [capital] punishment who is allowed to appeal but also others in his name, not only if he enjoins it but also [if] anyone else wishes to appeal. Nor is a distinction made as to whether [that person] is a relative of his or not; for I believe that for humanity's sake anyone who appeals should be heard. Accordingly, even if he himself acquiesced in the sentence, we do not inquire what is [the appellant's] interest. What, then, if the condemned man holds out against the appeal, and in his rush to doom does not want an appeal to be allowed? I would think that his punishment should be put off until then.

7 MARCIAN, *Appeals, book 1:* When someone, because of the ferocity of the judge, did not give his written statement of appeal to him from whom he was appealing but had made it public, the deified Severus pardoned him and allowed him to raise his appeal action.

8 ULPIAN, *Appeals, book 4:* You should know that a person who has appealed must not

revile him from whom he is appealing; but [if he does] he should be punished. The deified brothers wrote a rescript to this effect.

9 MACER, *Appeals, book 2:* You should know that when a judgment relating to liberty is given, neither a pupil nor a *res publica* can have *restitutio in integrum*, but an appeal is necessary. And there is a rescript to this effect.

10 ULPIAN, *Disputations, book 8:* Persons who have been condemned separately, even if in the same case, must make a number of [separate] appeals. 1. If, when a case is brought in one action which covers a number of counts, anyone is condemned to pay several sums of money which are individually not subject to imperial review, nevertheless, all those sums together have the effect that he can appeal to the emperor. 2. But when [common] grounds are proved against a number of persons to their injury, a single appeal will be sufficient, because they were all sued together under the one heading of proved grounds. 3. Whenever a number of persons are condemned to pay the one sum, the question is raised of whether there is a single sentence and, as it were, [whether] those several parties are required to undertake [to pay] that one sum, so that each of them is liable for the whole, or whether the judgment is split between the persons. And Papinian gave the opinion that the judgment is split between the persons and accordingly that those who are condemned owe [only] their individual shares. 4. But it has been laid down in a rescript that in a common action, whenever one party appeals and the other not, the success of the appellant profits him who did not appeal. However, it must be proved that they had one and the same occasion of defense; but if they are different, the case is altered. As happens with two tutors, if one had exercised his tutelage while the other had not attained it, and the one who had not exercised it appealed; for it is not equitable that he who had acknowledged the sentence, since he knew that he had exercised [tutelage], should succeed because of the appeal of him who had not.

11 ULPIAN, *All Seats of Judgment, book 3:* When money had been paid over on account of a judgment debt at the compulsion of the judge by one who, after lodging an appeal, earned a lighter sentence, he ought to get back the money which he paid.

12 ULPIAN, *Opinions, book 2:* If it be agreed that a *duumvir* was not elected by due process of law but only demanded by the clamor of the multitude and that the proconsul then assented to them, which he ought not to have done, an appeal is entirely superfluous since the case is clear.

13 ULPIAN, *Replies, book 2:* It does not at all harm an appellant that he did not set out in his written statement the part of the sentence from which he was appealing. 1. Nor is it customary for the appeals to be rejected of those who have at least one acceptable ground of appeal.

14 ULPIAN, *Edict, book 14:* If an invalid judgment be given against a will, we must see whether the judge's decision is law. And the deified Pius, when it was alleged that an action had been brought by collusion between parties banded together to the ruin of the legatees and their freedoms, allowed the latter to appeal. We apply this law nowadays, so that they can appeal; but they must bring their action before the same judge who conducted the hearing into the will, if they suspect that the heir did not bring his action in good faith. 1. It has been stated in a rescript that whenever, on an heir not appearing, judgment is given in favor of his opponent, there is no prejudice to legacies or freedoms. This [principle] is contained in a letter of the deified brothers to Domitius in the following words: "A judgment pronounced in the absence of the possessor, or of anyone appearing in his name, does not have the authority of a *res judicata*, except so far as it applies to a person who neglects to be present. For this reason, the [rights of] actions, should they have them, are safeguarded for those persons who have accepted freedom or legacies or *fideicommissa* in a will, just as if no judgment had been given; and accordingly we allow them to bring actions against the successful party."

15 MARCELLUS, *Digest, book 1:* Slaves cannot appeal; but their masters can use the help of an appeal to bring assistance to a slave, and another party can do this in the

name of the master. If, however, neither the master nor anyone else on his behalf appeals, we do not prohibit a slave on whom a heavy sentence has been passed from imploring help on his own behalf.

16 MODESTINUS, *Distinctions, book 6:* The constitutions which speak about receiving or not receiving appeals to the effect that no change is to be made [pending the appeal] have no application to the persons of those whom it is in the public interest to punish immediately on condemnation, such as notorious brigands or stirrers of sedition or leaders of gangs.

17 MODESTINUS, *Rules, book 8:* When a doubly divided judgment is given separately in the one case, for example, one [part] dealing with the principal, the other with the interest, a double appeal is necessary, so that it may not be assumed that the one judgment was acknowledged and the other subject to appeal. 1. If a tutor appeals on being appointed to a pupil, in the meantime a curator will be given to the pupil. However, if the *auctoritas* of a tutor is required, for example, for entering on an inheritance, then a tutor is necessarily appointed for him, because the authority of the curator is useless for this purpose.

18 MODESTINUS, *Replies, book 17:* Lucius Titius lodged an appeal on behalf of his slave, who had been condemned to the beasts. My question is whether the grounds of an appeal of this kind can be stated by a procurator. Modestinus gave the opinion that they can.

19 MODESTINUS, *Problems Solved, sole book:* If a judgment has been given expressly against the rigor of the law, it should not be valid; and accordingly, the case can be restarted from the outset without an appeal. A judgment is given unlawfully if it was specifically given contrary to the statutes, a *senatus consultum*, or a[n imperial] constitution. Wherefore, if anyone appeals against this judgment and has been cut off by a defense, the judgment is certainly not confirmed by this defense. For this reason it is possible for the case to be taken up again from the beginning.

20 MODESTINUS, *Prescriptions, sole book:* A person who holds a tutor suspect and calls in question his excuse for not accepting a tutelage is to be understood as acting in another's name. 1. However, a person appointed as procurator in his own case must appeal within the two-day period, because he is pleading his own cause. 2. The periods for lodging appeals are not relaxed in the case of soldiers; and if, after losing an action, they fail to appeal and to carry out the customary formalities, they are not thereafter given a hearing.

21 PAPIRIUS JUSTUS, *Constitutions, book 1:* The Emperors Antoninus and Verus wrote in a rescript that appeals which were made direct to the emperor, by-passing those to whom appeals ought to be made from the lower courts, were [to be] referred to the [provincial] governors. 1. The same [emperors] wrote in a rescript that an appeal is not properly made to the emperor from a judge whose appointment by the provincial governor the appellant had accepted, and that he should therefore be sent back to the governor. 2. If someone elected as magistrate appeals, his colleague for the time being must carry the burden of both offices; if both appeal, another person must be elected in their place for the time being; and he who appeals without cause shall acknowledge the loss [caused], if the *res publica* has suffered it; but if the appeal is justified and adjudged as such, [the judges] shall assess the damages [against him] to whom [the loss] is to be attributed. But another person must be appointed for the time being in place of the curator who is to administer the corn-supply, so long as his appeal is pending. 3. The same emperors wrote in a rescript that although it is not customary after an appeal for the fruits of land which is the subject of dispute to be put by, nonetheless, it seemed equitable to them that when [the fruits] might be carried off by the opponent of a pupil, they should be entrusted to *sequestres* (stakeholders).

22 PAPINIAN, *Replies, book 2:* A judicial examination which has been remitted to the emperor can be annulled by the person who remitted it.

23 PAPINIAN, *Replies, book 19:* With the consent of the litigants [but] short of a *compromissum*, the party who has lost can appeal from the provincial governor even after a judge has been appointed. 1. Since an imperial procurator, who was not performing the functions of a governor, did not have the right to give judgment in the law suits of private citizens, it was agreed that an appeal against his judgment, which was not binding, was pointless. 2. I gave the opinion that a son-in-power, when judgment had been given against his father regarding certain property which could be acquired through him, could appeal only in the name of his father. 3. It was agreed that a person, who was aware that a peremptory summons [had been issued], had not lodged a proper appeal according to the sequence of established procedure [against the contumacious], since it was in his power, either by appearing or by being defended in court before the appointed day, to refute the intimation of the summons.

24 SCAEVOLA, *Replies, book 5:* An administrator without authorization, or a tutor or a curator, having been condemned in [an action based on] good faith, appealed, and the case was much prolonged. After their appeal was pronounced unjustified, was the interest on the principal sum in the meantime due [to them] because judgment was given so slowly? The opinion [given] was that on the facts as stated, a *utilis actio* should be available. 1. The curator of a young man [under twenty-five], having gone to law against the heirs of the tutor, lodged an appeal; however, since the young man had now reached the age of twenty-five and was engaged in military service, he forbore to pursue the appeal. My question is whether, when the young man has returned from his military service, should he settle the appeal or ought the curator to be summoned for that purpose? The opinion [given] was that on the facts as stated, the soldier himself ought to follow up the action which related to him.

25 PAUL, *Replies, book 20:* The Emperor Alexander to the commonalty of the Greeks in Bithynia: "I do not see how anyone may be prevented from appealing by his judges, since it is permissible [for him] to make use of another route to the same end and to reach me more quickly. But we forbid procurators and provincial governors the use of *injuria* and *vis* against appellants, the restriction of them under military guard and, to put it briefly, the obstruction of their approach to us; they shall obey this my command in the knowledge that I care as much for the liberty of my subjects as for their goodwill and obedience."

26 HERMOGENIAN, *Epitome of Law, book 2:* After a case has been remitted to the emperor, a provincial governor, if the parties agree, can hear the case if the matter is within his judicial competence.

27 HERMOGENIAN, *Epitome of Law, book 5:* If a tutor appeals in a matter concerning a pupil, or a curator in that of a *minor*, his heir ought to follow up the grounds of appeal before he renders accounts; for once the accounts have been rendered, neither the tutor himself nor the curator is constrained to prove the merits of the appeal.

28 SCAEVOLA, *Digest, book 25:* A creditor had had an action with *fideiussores*; but after joinder of issue he himself was not present to plead his case, and after the *fideiussores* had been absolved, his slave appealed. Was the appeal, which the slave lodged in the name of his master, of no effect? The opinion was [given] that an appeal of this kind should not be regarded. 1. A plaintiff ordered by the judge to produce, in accordance with the order of the provincial governor, the account books which he had guaranteed were in his possession, after being granted an extension of time for the sake of the documents, did not produce them either on that day or thereafter, and was consequently condemned in accordance with the publicly read constitution, because he had contumaciously not produced the documents, although he had sworn how important their exhibition was to his case. Could he, after a judicial oath, lodge an appeal? The opinion [given] was that nothing had been adduced to show why he should be denied the help of an appeal. 2. Certain tutors who were appointed in place of the *tutor legitimus* brought an action on the tutelage against him, and when the *arbiter* con-

demned him to less than the equity of the matter demanded, they appealed from his decision; while the appeal was pending, the young man came of age. Since all the prosecution of this [case] would be a matter for adults and they can properly defend a case touching their own affairs, should not the claim of those against whom the appeal was lodged, alleging that the first party to go to law ought to state the grounds of appeal, be admitted? The opinion [given] was that those whose tutelage had been administered should not be barred, if they wished, from pursuing the case. The same [principle] is to be observed in curatories, if the [technical] adult reaches the full age [of twenty-five] in the meantime.

2

PERSONS FROM WHOM IT IS NOT PERMITTED TO APPEAL

1 ULPIAN, *Appeals, book 1:* We must deal [with those persons] from whom it is not lawful to appeal. 1. It is indeed pointless to caution you that it is not possible to appeal from the emperor, since it would be to him himself that the appeal would lie. 2. You should know that it is not possible to appeal from the senate to the emperor, as was provided in a speech of the deified Hadrian. 3. If anyone before [the giving of] judgment undertakes not to appeal from the judge, there is no doubt that he has forfeited the help of an appeal. 4. Sometimes the emperor has the custom of appointing a judge on such terms that it is not permitted to appeal from him; as I understand, such judges were very frequently appointed by the deified Marcus. Let us see whether any other person can appoint a judge in these terms; my view is that this is not possible.

2 PAUL, *Appeals, sole book:* Is it lawful to appeal against arbitrators who are appointed to examine *fideiussores*? Although in this instance [the appointment is] indeed not subject to appeal, some would consider that his decision can be amended by the person who appointed him.

3

WHO MAY APPEAL FROM WHOM

1 ULPIAN, *Appeals, book 1:* The phrase "the appeal lies to the person who appointed the judge" is to be understood as enabling an appeal to his successor. Similarly, if the urban prefect or the praetorian prefect appoints a judge, he who appointed the judge should hear the appeal. 1. A person who entrusts jurisdiction to another has not himself appellate status; for generally speaking, the appeal from the person to whom jurisdiction has been entrusted will lie to that person to whom appeal would have lain from the person who entrusted his jurisdiction.

2 VENULEIUS SATURNINUS, *Duties of Proconsul, book 2:* The proconsul can hear appeals from his legates; and if [the legate] has imposed a fine, the proconsul can examine his partiality and pronounce as he thinks best.

3 MODESTINUS, *Rules, book 8:* When a judge has been appointed by magistrates of the Roman people, of whatever rank, even if they appointed the judge by authority of the emperor who actually nominated him, it is to the magistrates themselves that an appeal will lie.

4

WHEN AN APPEAL IS TO BE MADE AND WITHIN WHAT TIMES

1 ULPIAN, *Appeals, book 1:* If a provincial governor registers someone on the list for deportation to an island and writes to the emperor [for permission] to deport him, let us see when an appeal should be made, whether when the emperor writes [back to the governor] or when he is written to [by the governor]. I would think that the appeal should be made

when the governor orders [the condemned] to be taken into custody, having given sentence that [his name] must be submitted to the emperor for deportation. Indeed, it is to be feared that it may be too late if he appeals only when the emperor has assigned an island for him; for, on the confirmation of the governor's sentence, it is then customary to assign an island. Again, it is to be feared that if [the governor] in striving to have the man deported has heaped falsehoods on him [in his letter] to the emperor, his avenue of appeal is cut off. What is [to be done] then? It will rightly be said and humanity suggests that his appeal should not be frustrated at whichever time [he appeals], earlier or later, since he has appealed not against the emperor but against the cunning of the judge. The same method is to be approved in the case of a decurion, whom a governor ought not to allow himself to punish; but he should put him in prison and write to the emperor about his punishment. 1. If anyone has been appointed as tutor, either in a will or by some other person who has the right of appointment, he should not appeal (for this was brought about by the deified Marcus), but he has the right to plead an excuse within a set period, and if this is rejected, only then should he appeal; but [if] he appeals earlier, [it will be] in vain. 2. The case is different with persons who have been called to any public duty or office, although they allege that they have an excuse; for they cannot put forward the grounds for their exemption other than by lodging an appeal. 3. For the most part, governors are accustomed to assign a nominated person to the *ordo*, so that [the decurions] may elect Gaius Seius a magistrate, or so that some other office or public duty may be conferred on him. Therefore, should the appeal be made when the *ordo* gives its vote, or should the appeal be lodged from [the time of] the assignation made by the governor? The prevailing view is that the appeal should be made when the *ordo* votes; for the governor seems rather to have given advice on who should be elected than to have made the appointment himself; so the appeal will eventually lie to him, not from him. 4. But if the governor himself is a member of the *ordo* (as frequently happens), then, when someone is elected by the *ordo*, the appeal will be from him, as if the appeal were from the *ordo*, and not from [the governor] himself. 5. A period of either two or three days from the date of giving judgment should be reckoned for the appeal. What, then, if judgment was given subject to a condition? Do we reckon the time for appeal from the date of the judgment or from that on which the condition is fulfilled? It is indeed true that a judgment should not be given subject to a condition, but if it is so given, what is to happen? And it is expedient that the periods for appeal should be reckoned [as starting] immediately. 6. The [principle] laid down for judgments, that the appeal should be made on either the second or the third day, should also be observed in other cases where, though indeed a judgment is not passed, yet an appeal should and can be made, as is set out above. 7. A speech of the deified Marcus resolved that those days on which an appeal may be made should be *dies utiles* for the particular purpose, if by chance the person from whom the appeal is made gives no opportunity for the written statement [of appeal] to be handed to him; for he says: "That day shall be reserved [as the first available] on which there is the first opportunity of access." For this reason if, after giving judgment, the judge who has pronounced it does not make himself available (as frequently happens), it must be stated that this does not prejudice the appellant at all; for he can appeal when first he does have the opportunity. So if [the judge] does immediately withdraw himself, the same remedy is to be available. 8. What, then, if the state of the hour brings about his retrial? Or what if the judgment was given very late in the day? He will certainly not seem to have withdrawn himself. 9. We always accept [it as] an opportunity for access if he made himself available in a public place; but if he did not do so, is it to be held against someone that he did not go to [the judge's] house, or make his way to his gardens, or even go further to his country house near the city? The prevailing view is that it should not be held against him. For this reason, if there was no opportunity of access in a public place, it will better be said that there was no opportunity of access. 10. If an appellant has had no opportunity of access to the person from whom he will be appealing, he may approach [the judge] to whom he will be appealing. If he does not approach him, we must see whether he is met by a defense; and we follow the practice that if there was opportunity of access to either one of the two, a defense should apply. 11. The accepted period, [for a person acting] in his own case, is two days. How do we distinguish his own case from that of another? It is clear that his own case is one in which the profit or the loss relates to someone in his own name. 12. For this reason, a procurator, unless he is appointed in his own case, shall have a third day; but if appointed in his own case, the prevail-

ing opinion is that he should observe the second day. If, however, he is litigating partly in his own name and partly in that of another, there can be room for doubt whether a two-[day] or three-day period is to be observed. The prevailing view is that he should observe two days so far as his own interest goes and three as regards the other. 13. Tutors, also *defensores rei publicae* and curators of the young or of an insane person, should have the third day for the reason that they are appealing in another's name. From this it appears that a *defensor* may appeal on the third day, provided only that he is bringing the case as *defensor* and not in his own name, although, by bringing his own case under the cloak of another's name, he can appeal on the third day. 14. Julian, in the forty-fifth book of his *Digest*, has written that if a person brings an action concerning a suspect tutor and loses, he ought to appeal within the three-day period, expressly as *defensor* of the pupil. 15. If [a judgment] has been given against someone in his absence, the two-[day] or three-day period must be reckoned from the time it comes to his knowledge, not from the time it was given. We understand this statement, that an absent person may appeal as from the time that [the judgment] comes to his knowledge, as applying only where he was not defended in the case by a procurator; for if the latter did not appeal, it is difficult for the former to be given a hearing.

2 MACER, *Appeals, book 1:* If you bring an action in the capacity of a procurator, lose, and appeal, and your appeal is then pronounced unjustified, it can be doubted whether you must appeal on the second day because, since it was your own appeal that was pronounced unjustified, your interest seems to be involved. But it will more correctly be said that you can appeal on the third day, since you are nonetheless defending another's case. 1. If, however, a person, other than the bringer of the action, but of such a kind that he has an interest, appeals, let us see whether he also can appeal on the third day. It must, however, be said that he ought to appeal on the second day, because the truth is that he is defending his own case. If he should say that it is lawful for him to appeal within a three-day period because he appears to be appealing in another's name, when, wishing his case to appear to be someone else's, he has left himself out, [the truth] is the opposite, because a person who has not conducted the action may not lawfully appeal in another's case. 2. If a person who was defending his right to freeborn rather than libertine status has lost his action and fails to appeal, can his father appeal, especially if the latter states that he is in power? If, indeed, he can do so, as is approved by the majority, he must appeal on the second day, as [if] in his own case. 3. Paul doubts whether, if a relative appeals on behalf of someone sentenced to capital punishment, he can be heard on the third day. It must be said that such a person also should appeal on the second day as if in his own case, because anyone who claims that his own interest is affected is defending his own case.

3 MACER, *Appeals, book 2:* Let us see, when a letter is sent to the emperor [from the judge], if a copy was issued to the litigant and he does not appeal and a rescript is subsequently issued against him; can he appeal from the letter copied to him long since? Because he did not appeal at the time, he is seen as having accepted the truth of what was contained in the letter; nor should he be given a hearing if he says that he was awaiting the outcome of the imperial rescript.

5

WHETHER APPEALS ARE TO BE ACCEPTED OR NOT

1 ULPIAN, *Edict, book 29:* It is not customary for appellants to be heard except those whose interest is affected, or who have been given a mandate, or who are without authorization administering another's business which will however shortly be ratified. 1. But also when a mother appeals as one who is concerned that her son's property was ruined by a judgment, she ought to be granted a hearing as a concession to family piety; and if she prefers to undertake the preparation of a lawsuit, she is not regarded as bringing an obstructive action, even though initially she cannot defend [the case].

2 SCAEVOLA, *Rules, book 4:* An appeal can be made before the judgment if, in a civil action, the judge has given an interlocutory decree that torture should be applied, or if, in a criminal case, he does so contrary to law.

3 PAUL, *Rules, sole book:* A person who has raised an action concerning a suspect tutor, has lost it, and appeals, may lawfully appeal within the three days.

4 MACER, *Appeals, book 1:* The petition of a person who is prevented from pursuing his action because he claims that he has sent a written statement to the emperor and is awaiting an imperial rescript, is forbidden to be heard; and if on this account he appeals, the imperial constitutions forbid his [appeal] being received.

5 ULPIAN, *Appeals, book 4:* It is sufficient if a person whose appeal is not accepted can [simply] say that his appeal has not been accepted; and whatever cause he shows for this, his appeal shall be admitted. 1. But when an appeal has not been accepted, if indeed it is the emperor who should have been appealed to, then a petition must be made to him; but if some person other than the emperor was the appellate authority, he will be the person who should be approached. 2. Again, if anything else took place by way of hindrance after the appeal was accepted, an approach should be made to the person to whom the appeal lies. 3. It is clear that if, after failure to accept an appeal, [the appellant] approaches the emperor rather than the person whom he should have approached, he will be treated just as if he had approached the correct person; and this is stated in the rescripts of our Emperor Antoninus. 4. It is clear that if he approaches one person other than the emperor instead of another, this error will avail him nothing although he is not regarded as having dropped [the appeal]. 5. A person whose appeal has not been accepted must approach either a competent judge or the emperor within the appointed periods for appeal.

6 MACER, *Appeals, book 2:* You must know that it is laid down in the imperial constitutions that when an appeal is not accepted, all matters remain in the same state [as before] and nothing new is done, even if the appeal was against the imperial treasury. It is laid down in the [imperial] mandates that [the appellate authority] who does not accept an appeal must forthwith make clear in a report his view and the reason why he did not accept the appeal, and he must issue a copy of this to the litigant.

7 PAUL, *Appeals, sole book:* If the matter does not admit of delay, an appeal is not permitted to prevent, for example, the opening of a will (as was laid down by the deified Hadrian), the making of a contract for grain for military use, or for the provision of the corn supply, or the entry of a testamentary heir into possession. 1. Again, if something is laid down by the praetor's edict, it is not permissible to appeal so as to prevent its being carried out. 2. Again, an appeal cannot be made to prevent the sale of a pledge.

6

LETTERS OF REPORT WHICH ARE KNOWN AS *APOSTOLI*

1 MARCIAN, *Appeals, book 2:* After the lodging of the appeal, [the judge] from whom the appeal is made must send letters to the person who is to hear the appeal, whether the emperor or someone else; these letters are called letters of report or [*libelli*] *apostoli.* 1. The tenor of the letters is as follows: for example, that Lucius Titius has appealed from the judgment of [Gaius] which was given between him and Seius. 2. However, it is enough for [the appellant] to have sought, urgently and on more than one occasion, [the issue of] letters of report within the time allowed; so that even if he fails to obtain them, this fact itself may serve as evidence; for the [imperial] constitutions require urgency of a person seeking letters of report. It is therefore fair that if it was the fault of the person who should have issued the letters that he did not do so, this should not prejudice the appellant.

7

NOTHING NEW IS TO BE DONE ONCE THE APPEAL HAS BEEN LODGED

1 ULPIAN, *Appeals, book 4:* Once an appeal is lodged, whether it was accepted or not, nothing new should be done in the meantime; this is because the appeal has now been accepted, if it has, or, if it has not been accepted, in order to avoid any prejudice to the consideration of whether the appeal should be accepted or not. 1. Once the appeal has been accepted, however, nothing new may be done until a decision has been pronounced on the appeal. 2. If then anyone happens to have been relegated and appeals, he shall not be excluded either from Italy or from the province from which he has been relegated. 3. By the same reasoning, if anyone has been deported by

a person having the right of deportation or registered [on the list of deportees], he shall not suffer fetters nor any other affront which is suffered by a person who had acquiesced in his sentence; for with the lodging of the appeal, his status is seen as remaining intact. 4. Accordingly, should he have been ordered not to serve as a decurion and he appeals, by the same reasoning, he can take part in meetings, since it is both laid down in constitutions and a matter of law that nothing new is to be done while an appeal is pending. 5. If anyone condemned for a number of crimes appeals against some of [the convictions] and not against others, should his punishment be postponed or not? If, indeed, there were a number of more serious charges in respect of which the appeal was lodged and a minor one in respect of which he did not appeal, then by all means his appeal should be accepted and punishment postponed; if, however, he earned the heavier sentence on the count against which there was no appeal, then by all means the penalty should be imposed.

8

JUDGMENTS WHICH MAY BE RESCINDED WITHOUT AN APPEAL

1 MACER, *Appeals, book 2:* We must remember that if the question is asked whether judgment has been given or not, and the judge of the case states that judgment has not been given, [in that case] even if judgment was given, it is rescinded without the need for an appeal. 1. Again, if there is stated to have been an error in the calculation of the judgment, an appeal is unnecessary, as, for example, if the judge pronounces: "Since it is agreed that Titius owes Seius fifty on one count and twenty-five on another, I accordingly condemn Lucius Titius to pay Seius one hundred." For since the error is one of computation, an appeal is unnecessary, and it is corrected without going to appeal. And if the judge of the case confirms the sentence of one hundred, if, indeed, his reason is that he thinks fifty and twenty-five make one hundred, then it is still the same error of computation and an appeal is unnecessary; but if it was because he says that there were other counts [amounting to] twenty-five, there is room for an appeal. 2. Again, should judgment be given contrary to the imperial constitutions, the need for an appeal is relaxed. Judgment is given contrary to the constitutions when it is pronounced with regard [only] to the legal force of a constitution and not to the legal right of the litigant. For if a judge tells a person seeking to be relieved of the charge of a public duty or of a tutelage by virtue of having children or of age or *privilegium*, that neither sons nor age nor any *privilegium* can serve to relieve one of a public duty or tutelage, he is understood to have pronounced on the basis of constituted law; but had he allowed him to bring proof of his legal rights, but given judgment against him because he found that he had failed to prove his age or the number of his children, he is understood to have pronounced on the legal right of the litigant in which case an appeal is necessary. 3. Again, the constitutions show that when condemnation takes place following a peremptory summons which is neither published nor comes to the attention of the absent [defendant], the judgment is of no effect. 4. Should we make claims against each other before the same judge, if my claim and yours were [both] exclusive of interest, and the judge condemned me before you so that you may first treat me as condemned, it is not necessary for me to appeal on this ground when, in accordance with the imperial constitutions, you cannot ask for execution of judgment against me before judgment has been given on my claim as well. But the prevailing view is that an appeal should be lodged.

2 PAUL, *Replies, book 3:* Paul gave the opinion that a person who was no longer alive at the time judgment was given appears to have been condemned without effect. 1. The same [jurist] gave the opinion, as regards a man who was no longer alive at the time the judge was appointed, that the appointment of the judge was invalid and that the judgment pronounced against him had no force.

3 PAUL, *Replies, book 16:* Paul gave the opinion that an impossible order by a judge was of no moment. 1. The same [jurist] gave the opinion that there is no reason to appeal from a judgment which cannot in the nature of things be obeyed.

9

WHETHER GROUNDS OF APPEALS CAN BE GIVEN BY A THIRD PARTY

1 ULPIAN, *Appeals, book 4:* The question is regularly asked whether grounds of appeal can be given by a third party, a thing which is frequently at issue in financial and in criminal cases. There are rescripts to the effect that this can be done in financial cases. The words of [one] rescript are as follows: "The deified brothers to Longinus. If the person who has appealed entrusted you with the defense of the appeal which Pollia brought against him, and the matter is financial, there is nothing to prevent your replying in his name. If, however, it is not a financial action but a capital case, it may not be conducted through a procurator. But if the case is such that a penalty [ranging] up to relegation customarily follows, you must know that such cases also ought not to be conducted by a third party, but [the principal] ought to be present at the hearing." Clearly, if it is a financial action, whose consequence is ignominy, the matter can be conducted by a procurator. And this must be confirmed in the case of the accuser too, whether he appeals or whether an appeal is made against him. In general, where an action cannot be raised by a third party, an appeal on it cannot be conducted by a third party either.

2 MACER, *Appeals, book 2:* If an absent person's procurator appeals and then renders his accounts, he himself should nonetheless appear. But let us see whether, on the procurator's desisting, the principal in the case can appear, as when a *minor* is concerned; however, it is recognized as better practice that he whose procurator has appealed in his absence ought to be heard in giving his grounds of appeal.

10

IF A TUTOR OR A CURATOR OR AN ELECTED MAGISTRATE APPEALS

1 ULPIAN, *Duties of Consul, book 3:* Any persons, nominated to public duties, who appeal and do not prove their case, are to know that it is on their own heads if the *res publica* has suffered any loss through the delay caused by their appeal. But if it appears that it was unavoidable for them to have appealed, the governor or the emperor will assess to whom this loss is to be ascribed.

2 HERMOGENIAN, *Epitome of Law, book 5:* If a tutor or curator retained [in office] appeals and dies before the case is heard, his heirs must necessarily give the grounds of his appeal because the risk is theirs for the meantime.

11

THE APPELLANT TO DEFEND HIMSELF IN [HIS OWN] PROVINCE

1 ULPIAN, *Appeals, book 4:* The deified brothers wrote in a rescript to Decimius Philo that a person who has appealed should make his defense to any other actions that he has in [his own] province, even if he goes outside it for the purposes of his appeal.

2 MARCIAN, *Appeals, book 2:* For this holds good for those persons who are absent for reasons of state so that they are not under the necessity of defending themselves.

12

[AN APPELLANT] MAY BE REQUIRED TO PLEAD ANOTHER ACTION BEFORE [A JUDGE] FROM WHOM HE IS APPEALING

1 ULPIAN, *Appeals, book 4:* Let us see whether, if a person appeals from a judge in one action, he is required to accept the same judge in another. We nowadays follow the legal principle that even if an appeal has been lodged, a person is still compelled to plead any other actions that he has before the same judge from whom he appealed. Nor is he to use this as a pretext on the grounds that he ought not to go to law before a resentful judge, since it is possible for him to make a fresh appeal.

13

IF DEATH OCCURS WHILE AN APPEAL IS PENDING

1 MACER, *Appeals, book 2:* On the death of the appellant, if he has no heir, then the appeal, whatever sort it was, becomes void. If, however, there is an heir to the appellant, then, if it is not in any other party's interest for the grounds of appeal to be given, he is not to be obliged to pursue the appeal; if, however, it is in the interest of the imperial treasury or of the other party against whom the appeal was made, the heir must necessarily give the grounds of appeal. It is not in the interest of any party when, for example, the deceased was relegated without confiscation of property. For if he was relegated with confiscation of property, or deported to an island, or condemned to the mines, and he dies after having lodged an appeal, our emperor Alexander sent a rescript to the soldier Plaetorius as follows: "Although, by the death of the person charged while the appeal is pending, the offense is extinguished, yet the sentence given as regards part of his property is made public, and the person who has the benefit of the succession can only win his case against it if, in giving grounds of appeal, he reveals an unfairness in the sentence." 1. Again, if a tutor dies after lodging an appeal in an affair concerning his pupil, his heir must necessarily give the grounds of appeal, even if the heir has rendered the accounts of the tutelage, because it is sufficient that, at the time of his death, he was under an obligation to give the grounds of appeal. However, the deified Severus and Antoninus wrote in a rescript that a tutor should not be compelled to give grounds for appeal after rendering his accounts.

14

RIGHTS OF THE IMPERIAL TREASURY

1 CALLISTRATUS, *Rights of the Imperial Treasury, book 1:* There are various reasons for which a denunciation is customarily made to the imperial treasury. For either someone makes a declaration that he cannot take that which was left to him tacitly, or he is forestalled by someone else and denounced; or because the death [of someone] is not avenged by his heirs; or because an heir is denounced as unworthy; or because the emperor has been instituted heir and the will or codicils are reported to have been purloined; or because someone is stated to have found treasure; or to have bought from the imperial treasury something of great price for a lesser one; or [it is stated that] the imperial treasury has been defeated by *praevaricatio*; or that someone has died while under a capital charge; or that someone has been charged even after his death; or that a house has been destroyed; or that an accusation has been abandoned; or that the object of a lawsuit is offered for sale; or that a penalty is due to the imperial treasury under a private contract; or that some offense has been committed contrary to statute. 1. Do insolvent properties belong to the imperial treasury by virtue of the civil law? Labeo writes: "Those things also which are insolvent belong to the imperial treasury by virtue of the civil law." Against his view, however, are the words of the praetor's edict that such property is sold, if nothing can be obtained from it for the imperial treasury. 2. The deified Pius wrote in a rescript to Coelius Amarantus that denunciation of *bona vacantia* terminates after four years, and that this period ought to be calculated from the date on which it becomes established that there exists no *heres* or *bonorum possessor*. 3. However, the prescription of twenty years, which is also observed in relation to the property

of persons registered as "wanted," is normally reckoned, under a constitution of the deified Titus, from when any [of that property] could have belonged to the imperial treasury. 4. But actions which are raised at once and prolonged beyond the twentieth year can be adjourned even after the twentieth year. 5. Again, those cases which are shown to have been reported by an earlier informer can be denounced to the imperial treasury even after the prescriptive period of years which we have stated.

2 CALLISTRATUS, *Rights of the Imperial Treasury, book 2:* In certain cases, the reputation of those undertaking a denunciation is not injured by it, as, for example [the reputation] of those who [denounce but] not for the sake of obtaining a reward, again those who denounce their adversary for the sake of revenge, or because someone is pursuing a case in the name of his *res publica*; and it is laid down in many places in the imperial constitutions that these [principles] are to be observed in this manner. 1. The deified Hadrian wrote a rescript to Flavius Arrianus in these words: "There is no doubt that someone who does not produce documents pertaining to a plea of the imperial treasury, although he has the ability to produce them, ought to suffer for this, so that unless the truth is found to be otherwise, those [documents] which would have injured his case will be presumed to have been withheld [deliberately]. But there ought to be no doubt apart from this that [the documents] should not injure him in any other matter than that in which they were missing." 2. Again, the deified brothers wrote a rescript in reply to a petition of Cornelius Rufus that the documents must be published whenever an inquiry is conducted about the right to take [under a will] or the right of ownership or some other similar pecuniary affair, [but] not if a capital case is involved. 3. The senate decided that if neither the informer nor the person in possession puts in an appearance after being called upon by three summonses, the *fideiussores* of the informer are liable, and thereafter the right of bringing a public action is taken away from him; but the possessor's right is to be the same as if he had not been denounced at all. 4. The deified Hadrian wrote in a rescript that whenever an informer, after being ordered to attend, fails to do so, and it is not proved that this was brought about by the dishonest conduct of the possessor, judgment should be given in favor of the possessor in such terms that the judgment may include that this edict has covered informers also. 5. The deified Pius wrote in a rescript to Caecilius Maximus that his father's constitution, by which an informer was compelled to publish the name of his mandator and, unless he published it, that he was to be put in prison, had the effect, not that an informer might evade punishment if he had a mandator, but that the mandator also should be punished just as if he himself had laid the information. 6. Our own Emperor Severus Augustus has laid down that slaves informing on their masters should not be given a hearing but subjected to punishment and that freedmen who are mandators of actions against their patrons should also be inflicted with punishment by the provincial governors. 7. There are a number of imperial rescripts in which it is provided that no one is to be prejudiced through his error because he informed on himself in ignorance of his rights. However, there is extant a rescript of those same emperors from which it appears that [the rule that] informing on oneself is not to prejudice anyone can be upheld if and only if the person concerned is of such a nature that he or she could be ignorant of his rights because of rustic simplicity or [membership of] the female sex.

3 CALLISTRATUS, *Rights of the Imperial Treasury, book 3:* A person is not understood to have fraudulently evaded the law if he has been openly [not tacitly] asked to restore [something]. But when some one had written in his will: "I ask you to keep your word in that which I requested of you, and I ask you in the name of God to carry it out," and it was questioned whether this should be understood as made openly, Julian gave the opinion that what was being sought from the heirs by words of this kind was not apparent. However, [he said] that the question customarily asked was: Just when may someone be understood to have given his word for the fraudulent evasion of the law? And the point had very nearly been reached when evasion of the law was held to take place not when someone was asked [to restore something] in a will or in codicils, but only when he put himself under an obligation by a private guarantee and a holograph to make good the *fideicommissum* to a person [legally] unable to take it. It could accordingly be said that from the words quoted above, there had not been fraudulent evasion of the law. 1. If anyone should have been asked [to perform a *fideicommissum*] both openly and tacitly, it used to be debated which [of the two] should rather prevail: Should it prejudice him that he had been asked tacitly or benefit him that an open request had been made? And the deified Hadrian wrote a rescript on the subject [to the effect] that anyone who had openly received a *fideicommissum* should not

be regarded as having given his word for the fraudulent evasion of the law. 2. But the subject at issue is when does it appear that a fraud has taken place, that is, whether regard should be had to the event or to the intention, if, say, at the time there was a tacit *fideicommissum*, the person to whom it was ordered there should be restoration was not in a position to take [the property], although, at the time of the death, he had the power to do so, or vice versa. It was agreed that regard should be had to the event. 3. Tacit *fideicommissa* frequently come to light in this manner, if a holograph is produced in which the person chosen to perform the trust has undertaken to hand back what comes to him from the property of the deceased. But, indeed, there may be other very clear proofs to the same effect. 4. When by reason of a tacit *fideicommissum* property belongs by right to the imperial treasury, all those things which were disposed of competently in the will are valid, as the deified Pius wrote in a rescript. 5. The deified brothers wrote in a rescript that in sales of property for the benefit of the imperial treasury honesty and carefulness are to be demanded of the [fiscal] procurator and that fair prices are to be established on the basis not of a past sale but of an up-to-date valuation; for just as by careful cultivation the values of landed estates are increased, in the same way, if they have been managed with less care, the [values] are necessarily reduced. 6. When a five-year period for which someone has bound himself on behalf of a public contractor has expired, he is not liable in the case of the following [five-year] period, and this is set out in imperial rescripts. The deified Hadrian also wrote a rescript in these words: "It is a truly inhumane practice whereby farmers of the public taxes and lands are held liable again if [the contracts] cannot be renewed at as high a figure. For farmers will more readily be found if they know that if they should wish to leave at the end of the five years, they will not be kept on [against their will]." 7. If the imperial treasury succeeds to a later creditor, it enjoys [only] the same legal rights which would have been enjoyed by the person to whom it has succeeded. 8. There are many imperial rescripts in which it is provided that the imperial treasury can only sue the debtors of its debtors if the principal debtors default, or if it is unequivocally proved that their debts were for the benefit of the imperial treasury's account, or if the debtors are being sued under a contract made with the imperial treasury. 9. The deified Hadrian wrote a rescript to Flavius Proculus that when [a slave], who is alleged to be part of property belonging to the imperial treasury, appeals for his freedom, judgment is [to be] given in the presence of and with the participation of those who customarily take part in the business of the imperial treasury. Cases of this kind involving free status, if they have not been decided in the presence of the fiscal advocate, [must be] heard again from the beginning. 10. If treasure is discovered in places belonging to the imperial treasury or in public places, burial places, or in funerary monuments, the deified brothers laid down that a half share of it might be claimed by the imperial treasury. Again, if [treasure] is found on property possessed by the emperor, a half share is likewise claimed by the imperial treasury. 11. But no one is compelled to inform on himself for having found treasure, unless a share of that treasure is owed to the imperial treasury. But a person who finds treasure in a place belonging to the imperial treasury and conceals the share belonging to the treasury is compelled to pay the whole amount and as much again.

4 ULPIAN, *Edict, book 6:* In cases involving the imperial treasury, those who come to an agreement with their denouncers are taken to have acknowledged liability if they have paid them any money, even a small amount.

5 ULPIAN, *Edict, book 16:* If an imperial procurator sells anything, even though he promises twice or three times the price in the case of eviction, the imperial treasury will only pay the simple sum. 1. If a person who has been granted the right of selling off fiscal property sells off anything belonging to the imperial treasury, it immediately becomes the property of the buyer, provided that he has paid the price.

6 ULPIAN, *Edict, book 63:* The imperial treasury, when it succeeds to the legal right of a private person, enjoys that person's rights as regards the period before its succession; but after it has succeeded, it will have its own privilege. But [is it privileged] as soon as the title begins to belong to it, or after it has sued the debtor, or after the title has been registered among those of the debtors? And, indeed, the imperial treasury sues for interest due to itself, even if the sums due are trivial from the time when it sues the particular debtor who admits [his liability]. But as regards the privilege, there are differing rescripts; my own view, however, is that there is scope for privilege from the time when the title has been registered among those of the debtors. 1. The accounts of the emperor and empress customarily have the same privilege as is applicable to the imperial treasury.

7 ULPIAN, *Edict, book 54:* If the imperial treasury should raise a question concerning any person's status, the fiscal advocate must be present. For this reason the deified Marcus wrote in a rescript that, if judgment has been given without [the presence of] the fiscal advocate, the action was of no effect and the hearing must take place [again] from the beginning.

8 MODESTINUS, *Rules, book 5:* The [slave] managers of property claimed for the imperial treasury cannot be sold by the [fiscal] procurators, and it is contained in rescripts that if they are sold off the sale is made void.

9 MODESTINUS, *Replies, book 17:* Lucius Titius made his sister heir to three quarters of his estate, [and] his wife Maevia and his father-in-law to the remaining shares; his will was voided by the birth of a posthumous child, which itself shortly died, and thus the entire inheritance devolved on the mother of the posthumous child. The testator's sister accused Maevia of poisoning Lucius Titius; when she had lost her action, she appealed. Meantime the woman charged died, but, nonetheless, letters of report were issued. Do you think that with [Maevia's] death, cognizance of the appeal should be sanctioned because of the inheritance being sought? Modestinus gave the opinion that while, with the death of the woman accused, the [criminal] charge was extinguished, it was competent for the imperial treasury to pursue that property which could be proved to have been obtained by wrongdoing.

10 MODESTINUS, *Prescriptions, sole book:* I do not think that a person who in debatable questions heedlessly gives replies against the interests of the imperial treasury commits an offense.

11 JAVOLENUS, *Letters, book 9:* No property can belong to the imperial treasury other than that which will remain after creditors have been paid off; for every man's property is taken to be what remains after the payment of his debts.

12 CALLISTRATUS, *Judicial Examinations, book 6:* Freedom is taken away from those condemned to the mines, since they may even be punished by flogging like slaves. The deified Pius wrote in a rescript that the imperial treasury certainly did not acquire anything through a person of this kind; and accordingly, he wrote, any legacy to a person subsequently condemned to the mines did not belong to the imperial treasury, and, as he says, they are *servi poenae* rather than slaves of the treasury.

13 PAUL, *Lex Julia et Papia, book 7:* In an edict of the deified Trajan, which I have set out above, it is indicated that if anyone, before his case is denounced to the state treasury, should have admitted that he did not have the right to take the property which was in his possession, he should pay part of it to the imperial treasury and keep part himself. 1. The same emperor subsequently indicated in an edict that whoever had admitted that there had been left to him, openly or tacitly, [something] which he could not [lawfully] take, and had proved that it already belonged to the imperial treasury, even if it were not in his possession, should have a half share of that which was collected by the prefects of the state treasury. 2. The reason preventing the right to take [under a will] is of no consequence. 3. But it is [property] which lies hidden that ought to be denounced, not that which evidently belongs to the imperial treasury. 4. It used to be thought right that [this] reward did not descend to the heirs of a person who had denounced himself; but the deified Hadrian wrote in a rescript that even if the person who had denounced himself died before the property which he had denounced was made over to the imperial treasury, the reward should be granted to his heir. 5. There is extant a letter of the same Hadrian to the effect that if someone who could have informed on himself is overtaken by death, his heir, if he makes a denunciation, may obtain the reward, "provided, however," in his words, "that it shall be clearly apparent that the deceased was intending voluntarily to denounce himself." If, however, he conceals the matter in the hope that it may remain hidden, his heir shall receive nothing more than the common reward. 6. Again, the deified brothers wrote in a rescript that the heirs of persons to whom a tacit *fideicommissum* had been left could denounce themselves in accordance with the benefit of Trajan, if and only if the person to whom [the *fideicommissum*] had been given had been overtaken by death and accordingly, because his time had run out, could not denounce himself. 7. When, before a will was opened information of a tacit *fideicommissum* had been laid by those who had accepted the tacit trust, and thereafter, following the opening [of the will], a denunciation was made by the *fideicommissarius*, the deified Antoninus ordered that his formal avowal was to be accepted; for the headlong haste of the denunciation of the previous party was not worthy of a reward, and when someone announces that he is not taking [something] he is rather seen as giving evidence of his own legal standing than as denouncing someone else. 8. The benefit of Trajan applies to those who are unable to take something left to themselves in a deceased person's will. For this reason I cannot inform on that which has been left to my slave. 9. [It has been stated that] persons who are turned away as unworthy are to be ruled out for a

reward of this kind; that is, those who have been bringing an action in respect of an undutiful [will], or have stated the will to be forged, and who have, up to the end of the proceedings, assailed the will. 10. The deified Hadrian, the deified Pius, and the deified brothers have written in rescripts that a person who has denounced himself in error, when he was able to take the whole sum, is not to be prejudiced by this.

14 GAIUS, *Lex Julia et Papia, book 11:* The imperial treasury is said to have confiscated entire inheritances under the *senatus consultum Silanianum* without preserving manumissions and legacies. It is not apparent that there is any good reason for this, since, when inheritances are forfeit to the imperial treasury for any other reasons of whatever kind, manumissions and legacies remain valid.

15 JUNIUS MAURICIANUS, *Lex Julia et Papia, book 3:* The senate resolved that if an informer seeks an annulment because, he says, he has made a mistake, the same judge should conduct a hearing into whether there is just cause for an annulment, and if he shall seem to have made a mistake, [the judge] may pardon his lack of judgment, but if he seems to have committed calumny, he shall pronounce that [crime] committed, and the accuser's situation shall be the same as if he had brought an action and abandoned it. 1. If anyone suborns an informer, he is to pay into the state treasury the amount which the informer would have received by way of reward if he had been successful. 2. The deified Hadrian wrote in a rescript that an informer who, on being cited, fails to reply to the summons, ought to suffer the same penalty as that to which he would have been liable if he had not proved his case. 3. The senate in Hadrian's time resolved that when someone denounces himself to the state treasury because he is not able to take [under a will], the whole amount should be gathered in to the state treasury and from it a one half share returned to the man himself in accordance with the benefit of the deified Trajan. 4. But if an informer, after being three times ordered to attend by summonses from the prefect of the state treasury, refuses to come, judgment is to be given in favor of the person in possession and present; but the man who, after being thus ordered to attend, does not do so, while the possessor does appear, is to be required to pay the amount which would have remained with the state treasury as a result of the denunciation he made if he had made good his declaration. 5. The senate resolved that a person from whom the imperial treasury recovered possession of an entire inheritance, or of all the legacies, should submit his accounts to the state treasury in precisely the same way as they should be submitted by someone from whom part of an inheritance or of a legacy is recovered. 6. If anyone is proved to have submitted falsified accounts, the prefect of the state treasury may investigate his case and order that there be paid to the state treasury a sum of money equal to the amount of the fraud he detects.

16 ULPIAN, *Lex Julia et Papia, book 18:* The words of the deified Trajan are: "whoever makes a declaration." We should understand "whoever" as applying to both male and female; for women also, although they are forbidden [to lay] informations, are still allowed, under the benefit of Trajan, to denounce themselves. And it will equally make no difference what the age is of the person who denounces himself, whether he is of full age or a pupil; for pupils also are allowed to denounce themselves [in respect of wills] from which they do not take.

17 MODESTINUS, *Punishments, book 2:* To sum up, you should know that claims for all penalties due to the imperial treasury are put after [those of] creditors.

18 MARCIAN, *Informers, sole book:* Women, because of the weakness of their sex, cannot make denunciations, as is provided in imperial constitutions. 1. Again, men of senatorial rank cannot make denunciations. 2. Again, condemned persons cannot make denunciations, as the deified brothers wrote in a rescript concerning a man who had been beaten with rods and sent to forced labor. 3. Again, by the imperial constitutions, persons who have been sent to the mines are forbidden to make denunciations. And this is so that they cannot in their desperation easily have recourse, without grounds, to laying an information. 4. But it is laid down by rescript that those cases which they began to denounce before their condemnation, can be pursued by them even after condemnation. 5. Veterans also are forbidden by the imperial constitutions to be informers because of the honorable nature especially of their completed service. 6. Again, soldiers are forbidden to make denunciations because of the honorable nature of their occupation. 7. But anyone can denounce a case common to himself and the imperial treasury, that is, [he can] make a claim, and he does not become infamous thereby, even if he fails to win his case. 8. Again, the deified Severus

and Antoninus wrote in a rescript that those who have been tutors or curators ought not to denounce cases relating to the pupils or minors who were their [charge]. The principle stemming from this is to be observed in the case of an unauthorized person who has administered another's affairs as though being his procurator; and the same emperors wrote a rescript to this effect. The same [emperors] decreed that it was not forbidden by any constitution for a procurator to be interrogated, but that [it was forbidden] for him to accuse the person whose affairs he has administered. They also laid down by rescript that any tutor who has either laid an information or ordered [this to be done], should be very severely punished. 9. Nor indeed should someone who has sold something lay an information about the same, either himself or through someone subordinate, lest otherwise he might suffer a punishment suited to his status, as was reportedly laid down. 10. Papinian writes in both the sixth book and the eleventh book of his *Replies* that money due to the treasury is to be taken away from one who, when he was a creditor, accepted it in discharge of a debt, if and only if he either knew, at the time he accepted it, that [his debtor] was also a public debtor, or he subsequently learned [this] before he spent the money. However, the approved view is that the money should in all circumstances be taken from him, even if he had no such knowledge when he spent it; and subsequently, certain emperors have written in rescripts that a direct action is available when money has been taken away, as Marcellus also writes in the seventh book of his *Digest*.

19 PAPINIAN, *Replies, book 10:* Finally, it is agreed that interest should not be answered for when money is called in, because the property not the person is being sued.

20 PAPINIAN, *Replies, book 11:* But, when money has been called in, a *utilis actio* will be granted against a *fideiussor* who has been set free.

21 PAUL, *Questions, book 3:* Titius, who owed me money under pledges while being a debtor to the imperial treasury, paid me what he owed; subsequently, the imperial treasury used its right to take the money from me. Had his pledges been released? Marcellus rightly considered that if the imperial treasury took away what had been paid me, release of the pledges was not valid. Nor do I think that we should admit the distinction [drawn by] those who think that it matters whether that which was paid be claimed back or an equivalent sum.

22 MARCIAN, *Informers, sole book:* Things which are the subject of dispute ought not to be sold off by an imperial procurator, but their sale should be postponed, as the deified Severus also and Antoninus wrote in rescripts; and on the death of a person charged with treason, his heir being prepared to vindicate the innocence of the dead man, they ordered the selling-off of his property to be suspended, and in general forbade anything which was the subject of a dispute to be sold off by a procurator. 1. However, procurators can sell off things bound in pledge. But if things were assigned beforehand to another person by right of pledge, the procurator ought not to harm the rights of the creditors; but if anything in the property exceeds [the debt pledged], the procurator is allowed to sell it under the rule that he should first satisfy the earlier creditors and that if there is anything over, it should be paid to the imperial treasury, or if the imperial treasury takes the whole, he himself should pay [the creditors]; or simply, if the procurator has carried out a sale, he shall order the money which is proved to be due to a private creditor, to be paid to him. The deified Severus and Antoninus wrote a rescript to this effect. 2. The deified Pius wrote in a rescript that he would not take over actions as gifts [in lieu of cash], even if someone promises the profits of what is left [to the emperor]; nor would he accept the gift of part of the profits. He added also that the person [making this offer] had deserved punishment for so base and odious a scheme, unless it appeared oppressive to impose a punishment on someone coming forward of his own accord. 3. Just as no one is compelled to denounce a case, so an informer is not given freedom to choose whether to drop [the action], and the deified Severus and Antoninus wrote in a rescript to this effect; and [they wrote] that the position was the same even if he should have made his denunciation at the mandate of a third party. They clearly stated by rescript that an informer wishing to drop an action should be given a hearing if he was complaining that his mandator had withdrawn.

23 CALLISTRATUS, *Rights of the Imperial Treasury, book 2:* The deified brothers wrote in a rescript that an informer who had begun to raise an action on his own, with no mention made of a mandator, should be punished, if he subsequently drops [the action], alleging that the mandator in the case has withdrawn.

24 MARCIAN, *Informers, sole book:* It is not only the informer who is punished if he fails to prove his case but also his mandator whom the informer has a duty to reveal.

25 ULPIAN, *Sabinus, book 19:* It was decreed and laid down by the Emperor Severus that in denunciations relating to the imperial treasury a person is in no wise to be compelled to prove from what source he has [received something], but that an informer must prove what he puts forward.

26 ULPIAN, *Sabinus, book 31:* When someone charged with a capital offense had emancipated his son, so that he might enter on an inheritance, it was laid down by rescript that this did not appear to have been done to defraud the imperial treasury, because there was no acquisition [by the person charged].

27 ULPIAN, *Edict, book 34:* When a husband failed to prosecute the death of his wife who had been murdered, the deified Severus wrote in a rescript that her dowry, insofar as it belonged to the husband, should be forfeit to the imperial treasury.

28 ULPIAN, *Disputations, book 3:* If a person who had pledged to me his present and future property comes to an agreement with the imperial treasury, you should know that Papinian gave the opinion that, in respect of property subsequently acquired, the imperial treasury has the stronger claim; and this has been laid down in a constitution. For the imperial treasury takes precedence over the action arising out of the pledge.

29 ULPIAN, *Disputations, book 8:* The position of one who has corrupted his informer is such that he is regarded as having lost the action; for it is so laid down in cases touching the imperial treasury. But the preferable opinion is that this penalty is applicable against the man himself who has bought off his accuser; for the rest, it ought not to descend against his heir. For the action does not expire from the time when it was bought off or a condemnation appears to have been made, but there must first be agreement on the charge, and judgment must be given. Clearly, if an action should happen to be raised about a case that needs to be started afresh, on which judgment has once been given on account of the corruption of the informer, the death of the corrupter will not hinder the possibility of raising the action and of the case being started afresh; for here it is the case that is being reinstated, not the penalty. 1. It is agreed that a person who has stated that a will is forged can enter on the inheritance; but if actions have been refused him, the imperial treasury will have scope [for an action]. 2. Obligations, which someone by entering on [an inheritance] extinguishes by merger, are not restored; for our emperor and his father wrote in a rescript in the case of a man who, after entering on an inheritance, failed to avenge the death of the deceased, that obligations once merged are not revived.

30 MARCIAN, *Institutes, book 3:* The Emperors Severus and Antoninus have written in a rescript that imperial procurators are not to alienate [slave] managers of property which has fallen to the imperial treasury; and if they have been manumitted, they are recalled to slavery.

31 MARCIAN, *Institutes, book 4:* The deified Commodus wrote in a rescript that the property of hostages, like that of prisoners of war, should in all circumstances be collected for the imperial treasury.

32 MARCIAN, *Institutes, book 14:* But if they [the hostages] have accepted the practice of [wearing] the Roman toga and always conduct themselves as Roman citizens, the deified brothers wrote a rescript to the procurators in the succession office that there was no doubt that the right of their heirs, by reason of the imperial benefit, was distinguished from [their own] status of hostage. Therefore, the same right should be reserved for them as that which they would have if they had been instituted heirs by Roman citizens under the civil law.

33 ULPIAN, *Replies, book 1:* [It is laid down that] he who has entered on the inheritance of a debtor to the imperial treasury has begun to be subject to the privileges of the imperial treasury.

34 MACER, *Criminal Proceedings, book 2:* The Emperors Severus and Antoninus wrote a rescript to Asclepiades as follows: "When a charge was brought against you, you made no defense, preferring to buy off the sentence. You were deservedly ordered to pay fifty solidi to the imperial treasury; for by failing to take part in the judicial examination of your own case, you exposed yourself to this penalty. For [the principle] must be maintained that those against whom fiscal actions are set on foot must come to the defense of their case in good faith and not seek to buy

off their opponents or judges."

35 POMPONIUS, *Letters, book 11:* Julian has written: If a private citizen alleges that Lucius Titius's inheritance belongs to him while the imperial treasury is the second claimant to the same inheritance, should the claims of the individual creditors not be held back to any greater extent [than usual], or should the right of the imperial treasury be examined first, and the actions of other persons be held up, to avoid prejudice to the public interest? And the latter is expressly stated in *senatus consulta.*

36 PAPINIAN, *Replies, book 3:* When landed estates have been sold off by the imperial treasury, it is agreed that the tribute [due] for the period that is past on those same estates falls as a burden on the buyer.

37 PAPINIAN, *Replies, book 10:* It has been agreed that a penalty is not to be sought by the imperial treasury unless the [private] creditors have recovered their money; the effect of this is not that the imperial treasury loses the right which it has in common with the private [creditors], but that its privilege in [seeking] a penalty is not to be exercised at the expense of the creditors.

38 PAPINIAN, *Replies, book 13:* The imperial treasury failed in an action over a forged will; but before that action was decided, it was agreed, following the subsequent laying of information by another person, that there was no heir to the property. I gave the opinion that after the first action, the fruits ought not to have been consumed; for once an action was raised, the appointed heir did not come within the scope of the benefit of the *senatus consultum.* 1. I gave the opinion that a person who asserted, although he had not been able to prove it, that money belonging to the imperial treasury, but held by another party, related to the management of his own time, had not been acting in the rôle of an informer because he had been pursuing his own case.

39 PAPINIAN, *Replies, book 16:* The property [of a condemned person] should not be awarded in the sentence to the imperial treasury if the penalty falls short of permanent exile. 1. I gave the opinion that a man who asked that the risk of a common condemnation should be divided [among the accused] on the grounds that after the alienations, which they had fraudulently made, had been revoked, the joint judgment debtors would be solvent, did not appear to have denounced a case involving money to the imperial treasury.

40 PAUL, *Questions, book 21:* A *fideicommissum* was given to an heir as follows: "I ask you to give Titius the farm which I asked you about." Should Titius be unable to take, the heir will not avoid the penalty for a tacit *fideicommissum;* for it is not leaving something openly if it cannot be ascertained from the will when it is read. In just the same way, a man does not make an open gift if he writes in these terms: "I ask you, my heirs, to carry out faithfully that which I solicited of you." Indeed, in the former example [the testator] is seen as having devised a more serious fraud in seeking to circumvent, not merely the statute but also the construction put upon the statute, which applies to a tacit *fideicommissum;* for although he denominates the farm, yet it is impossible to determine what was asked of the heir, since the diversity of [possible] things makes the legacy unclear. 1. Should a patron receive a tacit *fideicommissum* in such a way that he accepts responsibility for it out of his own share [of his freedman's estate], he is regarded as no longer acting fraudulently, because he is paying at his own expense.

41 PAUL, *Replies, book 21:* It is laid down that a person who has purchased *bona vacantia* from the imperial treasury ought to defend [any] action which was competent against the deceased.

42 VALENS, *Fideicommissa, book 5:* Arrianus Severus, the prefect of the state treasury, when the property of a person, who had been asked to hand over a tacit *fideicommissum* to someone who failed to take it, had been confiscated, decreed that the man to whom the *fideicommissum* had been left had nevertheless the right of making a denunciation under the constitution of the deified Trajan. 1. However, because some ungrateful persons, contrary to [the spirit of] the benefit of the deified Trajan, after making a formal declaration about a tacit *fideicommissum,* do a deal with those in possession [of the property] and, [though] called by three summonses, do not attend, the senate resolved that there be exacted from a person who had done this the same amount as should have remained with the state treasury as a result of the case in which he had made a denunciation, if he had fulfilled his declaration. Should the possessor also be convicted before the prefect of fraudulent evasion of the law, from him also is exacted what on conviction [on the original charge] he ought to have paid.

43 ULPIAN, *Fideicommissa, book 6:* Our emperor wrote in a rescript that the imperial treasury has actions *in rem* arising out of a tacit *fideicommissum.*

44 PAUL, *Views, book 1:* A person who denounces something to the imperial treasury in order to safeguard his own case is not an informer.

45 PAUL, *Views, book 5:* Things alienated, not only by gift but by any other means, to defraud the imperial treasury are revoked; and the rule is the same even if [revocation] is not claimed; for fraud is punished in all cases equally. 1. The property of those who have died in custody, or in chains or fetters, is not taken away from their heirs, whether they have died testate or intestate. 2. The property of a person who has committed suicide is not seized for the imperial treasury before it has been established what charge caused him to lay hands on himself. The property of a person who has committed suicide and laid hands on himself because of some crime committed is forfeit to the imperial treasury; but if he committed [suicide] out of *taedium vitae*, or from shame over a debt, or from inability to bear some illness, [his property] will not be disturbed but passes to his heirs. 3. It has been agreed that manumissions granted by a debtor in order to defraud the imperial treasury are withdrawn; but, indeed, it is not forbidden that he buy a slave from someone else in order to manumit [him]; and, therefore, he can then grant [him] liberty. 4. It is agreed that documents or holographs, which form part of property denounced to the imperial treasury, as also records relating to the rights of private persons, are to be returned on request. 5. Neither documents nor records ought to be disclosed by anyone against [the interests of] the imperial treasury. 6. The imperial treasury itself, however, issues copies of its own records on condition that the person who has a right to take the copy does not make use of these records either against [the imperial treasury] itself or against the state; and as regards this he is required to give security that if he should use them contrary to the prohibition, he will lose his case. 7. Whenever anyone is in litigation with the imperial treasury, power [to use] records must be sought so that [the applicant] may properly make use of them, and they are to be certified in the hand of the records officer. If, however, they are disclosed in any other manner the person who thus discloses them loses his case. 8. Whenever the same action is brought again before the fiscal court, it shall be lawful to call for an official reading from the earlier records, the use of which had not [previously] been requested. 9. A man who, after being sued by the imperial treasury on behalf of another, discharges the debt, may with justice seek to make a claim on the property of the person on whose behalf he made the payment; and it is customary for him to receive official assistance in this. 10. It has been agreed that persons in debt to the imperial treasury should not be refused if they seek an adjournment in order to raise the money. The assessment of this matter is left to the discretion of the judge, provided that in the case of larger amounts, [the period] may be extended for not more than three months, but in the case of smaller for not more than two; [any] longer period of time, however, must be sought from the emperor. 11. If the property of the principal debtor has devolved upon the imperial treasury, the *fideiussores* are released, unless by chance he is insufficiently solvent, and they become accessory to the remainder of the sum that has not been fully paid. 12. If, when the property of a debtor has been sold off by the imperial treasury, a larger sum is obtained [than the amount of his debt], it is both lawful and right to seek its restoration. 13. A person leasing a farm which belongs to the imperial treasury cannot transfer anything from it, nor sell any cypress or olive timber without planting replacements, and [he cannot] cut down other fruit-bearing trees; and [if he does so] after an assessment has been made of this occurrence, he is liable to a fourfold penalty. 14. No farm and no taxes are to be let out to persons below the age of twenty-five in case they should make use of the benefit of their age in respect of them.

46 HERMOGENIAN, *Epitome of Law, book 6:* The right of succession is taken away from a person on the ground of unworthiness, if he, although having been instituted heir as a son, is declared, after the death of his alleged father, to have been suppositious. 1. A person who has knowingly received anything in order to defraud the imperial treasury is compelled to restore not only the thing in respect of which he made himself accomplice to the fraud but as much again. 2. Anything which has been acquired by a provincial governor or by a procurator or by anyone else in the province in which he holds office, even if through a man of straw, is forfeit, after the contract has been invalidated, and its value paid to the imperial treasury; and again, anyone who holds office in a province is forbidden to build a ship there. 3. The imperial treasury always has the right of pledge. 4. A person who challenges the imperial treasury over the rendering of an account must show what is owed to himself within two months. 5. It has frequently been laid down that debtors of the imperial treasury must have set off against their debt what the imperial

treasury owes [them], an exception being made for *tributa* and *stipendia*, as also for the value of anything bought by the imperial treasury, and anything owing from a case involving the corn supply. 6. A person subject to a charge can administer his own property, and his debtor may properly pay him in good faith. 7. [Fiscal] procurators are forbidden, without consulting the emperors, to put up for sale [slave] managers who are undertaking any employment relating to property which is being sold off, and if they should be sold, the sale will be of no effect. 8. If a slave of the emperor has entered on an inheritance at the order of a procurator, he acquires it at the wish of the emperor. 9. If several persons have [together] defrauded the imperial treasury, they are liable, not each for the entire sum as in an action for theft, but all together for a fourfold penalty, to the extent of each one's means. Indeed, those who are solvent are sued for those who are not.

47 PAUL, *Decrees, book 1:* A certain [woman called] Moschis, who owed money to the imperial treasury arising from the farming of a tax, had had heirs from whom, after they had entered on their inheritance, Faria Senilla and others had bought landed estates. When [the buyers] were sued over the arrears left by Moschis, they alleged both that Moschis's heirs were solvent and that many others had bought from the same estate; the emperor thought it right that the heirs ought first to be sued, and thereafter every person in possession for the balance; and he gave judgment accordingly. 1. Aemilius Ptolemaeus had taken the lease of an estate from the imperial treasury and had let it out bit by bit to a number of persons for a greater sum than he had himself undertaken; he was sued by the imperial procurators for the sum that he himself had received. This seemed unfair and unprofitable to the imperial treasury that it should in spite of this sue at its own risk those to whom he had granted leases; and so [the emperor] gave judgment that he should be sued [but] only in respect of that amount to which he had been liable as lessee.

48 PAUL, *Decrees, book 2:* Statius Florus, having written his will, had given a tacit *fideicommissum* to his heir, Pompeius, that he should give a farm and a certain amount of money to someone not [capable of] taking, and had on that account taken care that security be demanded of Pompeius that he would hand over that which he [Florus] had given as an advance legacy. Subsequently, the same Florus, having made a second will and instituted the same Pompeius and one Faustinus as his heirs, had given no advance legacies to Pompeius. The person [named in the earlier will] who had been unable to take had denounced himself. The emperors, having been consulted by the procurators, had written in a rescript that if it were not proved that the [testator's] intention had changed, the *fideicommissum* must hold good; and thus, Pompeius, on being condemned, asked that that burden should be one on the inheritance, because he had not received any advance legacies; nor could the testator be regarded as having maintained in part the intention in his first will, but [only] as a whole. [The emperor] gave judgment that the earlier will no longer stood; nor, if [the testator] had granted [something] in his first will, could it be sought from a later one unless the grant had been repeated. It was agreed that because [Pompeius] did not prove, on the single fact of his having given security, that the advance legacies had been granted to him, he alone must carry out the *fideicommissum*. 1. A mother who was instituted as heir [by her son] was asked [in the will] to restore the inheritance on her death to Cornelius Felix. When the woman, as the appointed heir, was condemned by the imperial treasury and all her property confiscated, Felix alleged that he had priority over the [fiscal] penalty (for this is laid down in the constitutions). But anyhow, the [operative] date of the *fideicommissum* had not yet arrived, because he himself might die first, or even the mother herself acquire other property, [so] his petition was turned down meantime.

49 PAUL, *Tacit Fideicommissa, sole book:* When someone to whom a tacit *fideicommissum* had been given had denounced himself as unable to take anything, the question was raised whether, under the benefit of the deified Trajan, he ought to

receive a one half share of three quarters [of the estate] or of the whole. There is extant on the subject a rescript of the Emperor Antoninus in these words: "The Emperor Antoninus to Julius Rufus. A person who undertook a tacit *fideicommissum* that he should hand over an inheritance to someone who is not [capable of] taking, if he handed it over after deducting one quarter, ought to keep nothing. But the quarter share which is assigned to the heir, let it be taken away from him and delivered to the imperial treasury." From this [we see that] someone who has denounced himself receives only a half share of three quarters [of the estate].

50 PAUL, *Decrees, book 3:* Valerius Patruinus, an imperial procurator, had assigned landed estates to Flavius Stalticius for a fixed price. Subsequently, other bidding took place and the same Stalticius, after his overbid was received, had been successful and had been admitted to vacant possession. A question was raised about the fruits which had been gathered meantime; Patruinus wished them to be the property of the imperial treasury. Clearly, if they had been gathered in the time between the first bidding and the subsequent overbid, they would belong to the seller (as is customarily said, when there was *in diem addictio* and then a better offer has been made), nor should we be swayed by the fact that [the overbidder] was the same man to whom the estates had originally been assigned. But when both assignations had been made within the period of the grape harvest, there was a departure from this general practice, and, therefore, it was agreed that the fruits belonged to the buyer. Papinian and Messius introduced a new opinion, that because the estates were under a tenant, it was unjust to deprive him of all the fruits, but that the tenant ought to gather them while the buyer should receive the rent for that year, so that the imperial treasury should not be liable to the tenant because he had not been permitted to enjoy [the fruits], just as if this had been agreed as part of the purchase. The emperor, however, gave judgment, following their opinion, that if, indeed, the lands were being cultivated by the owner, [Stalticius] should have all the fruits; if under a tenant, he [should] receive rent. On Tryphoninus raising the question what was his opinion about dried fruits which had previously been gathered on the estates, he gave the opinion that if the date for payment of rent had not yet arrived when the [lands] were assigned, the buyer would take them also.

15

PRISONERS OF WAR, *POSTLIMINIUM*, AND PERSONS RANSOMED FROM THE ENEMY

1 MARCELLUS, *Digest, book 22:* That for which the slave of a person who has been captured by the enemy subsequently stipulates, or any legacy which may come to his slave after he has passed into the hands of the enemy, shall be the property of his heirs because, if he had died in the course of his captivity, it would have been acquired by the heir.

2 MARCELLUS, *Digest, book 39: Postliminium* applies, according to the custom of war, to warships and freighters, not to fishing boats or to fast passenger vessels fitted out for the purpose of pleasure. 1. Again, a horse or mare broken to the bit is recovered by *postliminium*; for they can have run away without fault of the rider. 2. The same legal right does not apply to arms, insofar as they are not lost without shame; for it is forbidden to return arms by *postliminium*, since their loss is disgraceful,

3 POMPONIUS, *Quintus Mucius, book 37:* as also clothes.

4 MODESTINUS, *Rules, book 3:* It was agreed by the men of old that persons captured by, or surrendered to, the enemy should return according to the right of *postliminium*. Whether a person who, after being surrendered to the enemy, has returned and

not been accepted by ourselves, is a Roman citizen was dealt with variously as between Brutus and Scaevola; and it follows that he may not obtain citizenship.

5 POMPONIUS, *Quintus Mucius, book 37:* The right of *postliminium* applies both in war and in peace. 1. In war, when those who are our enemies have captured someone on our side and have taken him into their own lines; for if during the same war he returns he has *postliminium*, that is, all his rights are restored to him just as if he had not been captured by the enemy. Before he is taken into the enemy lines, he remains a citizen. He is regarded as having returned from the time when he passes into the hands of our allies or begins to be within our own lines. 2. *Postliminium* is also granted in peacetime; for if we have neither friendship nor *hospitium* with a particular people, nor a treaty made for the purpose of friendship, they are not precisely enemies, but that which passes from us into their hands becomes their property, and a freeman of ours who is captured by them becomes their slave, and similarly if anything of theirs passes into our hands. In this case also *postliminium* is therefore granted. 3. If, however, a prisoner of war is released by us and joins his own people, he is understood to have returned with *postliminium* if and only if he prefers to follow those [who are his own] rather than remain in our *civitas*. Accordingly, in the case of Atilius Regulus, whom the Carthaginians sent to Rome, the opinion was given that he had not returned with *postliminium* because he had sworn that he would return to Carthage and had not had the intention of remaining in Rome. And so in the case of a certain Menander, an interpreter, who was sent to his own people after he had been manumitted among ourselves, the law passed to cover him, that he should remain a Roman citizen, was not seen as necessary; for if his intention was to remain among his own people, he would cease to be a citizen, while if his intention were to return, he would remain a citizen; the law, therefore, would be entirely pointless.

6 POMPONIUS, *Readings, book 1:* A woman, condemned to the saltworks for a crime, was subsequently captured by petty brigands of a foreign nation and sold under the rules of trade. She was ransomed and reverted to her proper condition. The price paid was to be restored to Cocceius Firmus, a centurion, from the imperial treasury.

7 PROCULUS, *Letters, book 8:* I have no doubt that although free peoples and those bound to us by treaty are foreigners to us, there is no *postliminium* between us and them; for what need is there of *postliminium* between us and them, since they retain their freedom and rights over their own property in our country just as in their own, and the same applies to us in their country? 1. A free people is one which is not subject to the control of any other people; a *civitas foederata*, one which has either entered into friendship under an equal treaty or under a treaty [which] includes the provision that this people should with good will preserve the *majestas* of another people. It has to be added that that other people is to be understood to be superior, not that [the federated] people is not free; and insofar as we understand our client [states] to be free, even if they are not our equals in authority, dignity or power, so also those who are bound to preserve our *majestas* with good will are to be understood to be free. 2. But persons from *civitates foederatae* may be charged in our courts, and we inflict punishments on them [if] condemned.

8 PAUL, *Lex Julia et Papia, book 3:* A wife cannot be recovered by her husband, as a son can be by his father, by right of *postliminium*, but only when she wishes and so far as she has not married another after the fixed period [of five years]; but if she is unwilling, without there being a valid reason, she will be liable to the penalties for [unjustified] divorce.

9 ULPIAN, *Lex Julia et Papia, book 4:* A son born in enemy hands, if he returns with *postliminium*, possesses the legal rights of a son; for there is no doubt that he has *postliminium*, following the rescript of the Emperor Antoninus and his deified father to Ovinius Tertullus, governor of the province of Lower Mysia.

10 PAPINIAN, *Questions, book 29:* A father had appointed a substitute heir for his underage son who was instituted [heir]; he was captured by the enemy, and died there. On the subsequent death of the *impubes*, it appeared to some [authorities] that the [*heres*] *legitimus* was admitted [as heir] and that the *tabulae secundae* did not apply to the person of him who, had his father lived, would have become *sui juris*. However, the principle of the law gainsays this view; for if the father who failed to return is taken to have died at that time when he was captured, the substitution necessarily has its effect. 1. If, after the death of the father, an *impubes*, whom he has either instituted [heir] or disinherited, should be captured, it is self-evidently true to say that the *lex Cornelia*, which does not refer at all to *tabulae secundae*, applies only to a person who had *testamenti factio*. It is clear that an inheritance under the *jus civile* of a captive, even one *impubes*, is to be transmitted under the *lex Cornelia*, since it is true that an *impubes* indeed did not have *testamenti factio*; and, therefore, it is not inappropriate for the praetor to follow the father's intention as much as that of the law, and to grant to a *heres substitutus utiles actiones* for the inheritance.

11 PAPINIAN, *Questions, book 31:* However, if the son dies in the *civitas* before the death of his father in captivity, there is no action that can be taken as regards the *tabulae secundae*, either because the son-in-power is regarded as dying during his father's lifetime, if [the latter] has returned, or because, on the father's failure to return, the son is regarded as having been *sui juris* from the time his father came into the power of the enemy. 1. But if they should both be in enemy hands and the father dies first, the *lex Cornelia* applies to the *heres substitutus* just as if, after the father's decease in enemy hands, the son had later died in the *civitas*.

12 TRYPHONINUS, *Disputations, book 4:* In wartime *postliminium* exists, as also in peacetime for persons captured in war for whom no provision was made in the negotiations. Servius [Sulpicius Rufus] writes that this was agreed because the Romans wished their citizens' hope of returning to lie in their military courage rather than in peace. There are, however, those who have traveled in peacetime to foreign [peoples] and, on the sudden outbreak of war, are seized and become the slaves of those who have now become their enemies. The right of *postliminium* applies to them, in war as in peace, unless it had been provided in a treaty that the right of *postliminium* should not apply to them. 1. Should someone be captured by the enemy, those whom he had in his power are in an uncertain state, whether they become *sui juris* or are still to be reckoned as sons-in-power; for on his death in enemy hands, they will be considered as *patres familiarum* from the date of his capture or, should he return, as never having ceased to be in his power. Therefore, it has been debated whether, if, when the father has not returned, it should happen that others have been instituted heirs to all the estate ([the *sui*] being disinherited by the will) or to part of it, those things that [the *sui*] acquire meantime by stipulation, delivery, or legacy (for they cannot [do so] by inheritance) are part of the captive [father's] inheritance which falls under the *lex Cornelia*, or become their own property. The latter is true; and it is different in the case of those things which are acquired through slaves, and rightly so; for the one class were [part of his] property and continue to be so, while the others are understood to be *sui juris* from then on and for that reason to have acquired on their own behalf. 2. By no [imperial] constitution can questions of fact be undone. Therefore, usucapion is interrupted of property which was being usucapted by himself in person, by a possessor who is subsequently captured, because it is certain that he has ceased to have possession. However, Julian writes that it was believed in his time that usucapion of property which the [captive] was possessing and usucapting through persons legally subject to himself, or if in any way [this property] is included subsequently under the heading of *peculium*, continues to be fulfilled so long as those persons remain in possession. Marcellus writes that it makes no difference whether he possesses himself or through a person subject to him, but we should follow Julian's opinion. 3. A son who was in the power of someone [now] a captive can in the meantime marry a wife, although his father cannot consent to the marriage; for by the same token [he cannot] refuse consent. An acknowledged grandchild, therefore, will be in the power of the

returned captive, as his grandfather, and *suus heres* to him, even though it was to some degree against his will, because he did not give consent to the marriage. Nor is this surprising, since the situation and the exigency of that time brought it about, and the social utility of marriage required it. 4. But the wife of a captive, however much she may wish it and although she may live in his house, is not in the married state. 5. Codicils that a person writes during the time of his captivity are not in formal law taken to be confirmed in a will which he had made in the *civitas*. Nor is it possible for a *fideicommissum* to be sought from [the codicils], since they were not made by someone who had *testamenti factio*. But because the basic origin of them had been established in the *civitas* when the captive was settled there, that is, the confirmation of the codicils in the will, and the [testator] has returned and recovered his rights by *postliminium*, it is in accordance with humane principles that those codicils should be valid just as if meanwhile no period of captivity had intervened. 6. A person's other legal rights, after he has returned with *postliminium*, are considered just as if he had never been in enemy hands. 7. If anyone ransoms a captured slave from the enemy, he is thenceforth the property of the ransomer, even if [the latter] knows that he belonged to someone else; but on there being offered to him by the former master the price that he paid, the slave is to be regarded as having returned or been taken back by *postliminium*. 8. Again, if someone has redeemed a captive in ignorance, believing him to be the property of the seller, let us see whether he can be regarded as having usucapted him, if the former master did not have the opportunity to offer the price after the period fixed by law. As against this, the constitution which was passed concerning ransomed [property] makes him the slave of the person who ransomed him, and it is not possible for me to be understood as usucapting what is now my property. Again, since the constitution does not worsen but if anything improves the position of those who pay ransoms, it is unjust and contrary to the intention of the constitution for a buyer's oldest right, based on good faith, to be extinguished; and therefore, once the time has passed in which usucapion could have been [completed], had not the constitution made him [the ransomer's] own property, it will correctly be stated that under the constitution there is nothing left for the master. 9. But if [the ransomer] manumits him, does this only mean that he has ceased to be master, and does the slave whom he has abandoned return to the legal ownership of his previous master? Or does he make him a freeman, so that the [apparent] granting of freedom is not [just] a transfer of ownership? Certainly, someone manumitted while in enemy hands is freed; but if his former master had gained possession of him within our lines although [the slave] was not following our cause but had come all the while with the intention of returning to [the enemy], he would retain the slave by the right of *postliminium*. In the case of freemen, it was otherwise; for [a freeman] would not return with *postliminium* unless he had come [back] to his own people with the intention of following their fortunes and of leaving those from whom he had departed, because, as Sabinus writes, everyone has the unrestricted power of deciding on his own *civitas*, [but not on] the right of ownership. This does not, however, greatly burden our present consideration, since manumission [carried out] under enemy law could not prejudice a Roman citizen who is the owner of a slave; but the [slave] about whom we are inquiring had a Roman citizen as his master under our law as established by the constitution, and we are dealing with whether he can obtain freedom from him. For what if he never offered the price of him? What if he had no opportunity of suing him? Shall the slave be free, who can obtain freedom from his master by no merit of his own? That is unjust and contrary to the *favor libertatis* established by our ancestors. Certainly, under the old law if a third party had bought in good faith [a slave] from someone who had ransomed him in the knowledge that he belonged to another, [the buyer] could usucapt him and bring him to liberty, and in this way also the former master, who had been [his owner] before his captivity, would lose his rights. Why, therefore, does this person not have the right to manumit him? 10. If he was a *statuliber* before his capture by the enemy, then, on being ransomed, he will retain his status as long as the condition [of his freedom] is still pending. 11. What, then, if he had accepted his freedom on condition that he

paid ten thousand? From where ought he to pay? Because even if it was allowed to the *statuliber* to pay out of his *peculium*, yet can it be said this [*peculium*,] which he has while in the possession of the man who ransomed him, is a substitute for that which he would have acquired while in enemy hands? At any rate, if it was acquired in connection with the affairs of [his ransomer] or through his own work he cannot pay from there; but he can pay out of a *peculium* originating from some other cause, and so we may charitably regard him as having complied with the condition [of his freedom]. 12. If a slave had been given as a pledge before his captivity, he falls back under the old obligation after his ransomer has been paid off, and if the creditor offers the ransomer the amount for which he was ransomed, [the creditor] has a double claim in respect both of the previous instance of debt and of the sum with which he freed him, as if that claim had been sanctioned by a particular constitution, as when a subsequent creditor gives satisfaction to a previous one for the purpose of confirming his pledge, except that in this instance the matter is reversed, and it is the subsequent [party], because he was responsible for the slave's being in our hands, who has to be paid off by the previous one, as if the latter were in the weaker position. 13. If he had been the slave of a number of people and the price is paid over to the man who ransomed him in the name of all of them, he will return to their common ownership; if [it was paid] in the name only of one or of some of them, not all, he will belong to him or to those who have paid, with the effect that they obtain their old rights over their own share [of the slave] and become successors to the ransomer as regards the share of the rest [who did not pay]. 14. If a captive was due his liberty under a *fideicommissum*, on being ransomed, he cannot yet seek it unless he has recompensed his ransomer. 15. If the enemy has captured a deported person from his island, if he should by some chance be ransomed and return, he will arrive at the same condition as he would have held had he not been captured, and will therefore be deported. 16. And if, in the case of a captive slave, there was some pre-existing reason which would prevent his freedom either temporarily or permanently, it will not be altered by his being ransomed from the enemy, as, for example, if it had been established that he had committed [an offense] against the *lex Fabia* [on kidnapping], or had been sold on condition that he should not be manumitted; in the meantime, however, the ransomer shall possess [him] without penalty on his own part. 17. Accordingly, someone captured from the mines who is ransomed shall be returned to his punishment, but, however, he shall not be punishable as a runaway from the mines, but his ransomer shall receive a reward from the imperial treasury. This was laid down by our emperor and by the deified Severus. 18. If a legacy is made to you of a child of Pamphila and you ransom the mother and she gives birth in your house, it does not appear that you possess this offspring with intent to profit, but [it is] for the office and discretion of the judge to estimate the [value of] the offspring at a fixed price, just as if the offspring had been sold at whatever price the mother was bought for. But if the child which she was carrying in her womb at the time she was captured by the enemy, who was born while still in enemy hands, is ransomed with his mother by the same person and for the one price, then, by offering as much of the price as was given in the one [payment] for both, an estimate is reached of the value of the offspring; and he is seen as having returned with *postliminium*. This is much more so if there are different buyers for both [mother and child], or for one of them. But if [someone] ransomed each [of them] at an individual price, what was paid to the enemy for each should be offered for each individual to the ransomer, so that [the two of them] can also return separately with *postliminium*.

13 PAUL, *Sabinus, book 2:* If I should have given myself to you for adrogation, it is agreed that after my emancipation, my son, on his return from the enemy, will be in the position of a grandson to you.

14 POMPONIUS, *Sabinus, book 3:* Since there are two types of *postliminium*, either that we should return to our own people or that we should receive back a certain thing, when a son returns, he ought to be an instance of both types of *postliminium*, in that his father is getting him back and he himself is getting his rights back. 1. A husband does not get his wife back by *postliminium* as a father does his son; it is only by consent that the marriage is renewed.

15 ULPIAN, *Sabinus, book 12:* If, when his father has been ransomed and has died before discharge of the debt, a son after his death should offer the amount of the ransom, it should be said that it is possible for him to be *suus heres* to [his father]; unless by chance someone should say with greater formal logic that [the father], in dying, had obtained *postliminium*, the legal right of pledge being as it were at an end, and that he had died without the obligation for the debt, so that he was able to have a *suus heres*. This will not be an unreasonable argument.

16 ULPIAN, *Sabinus, book 13:* A person who comes home from enemy hands is retrospectively regarded as having been in the *civitas.*

17 PAUL, *Sabinus, book 2:* Those who, after being defeated, have surrendered themselves along with their arms to the enemy do not enjoy *postliminium.*

18 ULPIAN, *Sabinus, book 35:* In every branch of the law, a person who fails to return from enemy hands is regarded as having died at the moment when he was captured.

19 PAUL, *Sabinus, book 16: Postliminium* is the right, established by customs and laws between ourselves and free peoples and kings, of recovering from a foreigner property which has been lost and restoring it to its former condition. For what we have lost in war, or even short of war, if we recover it again, we are said to recover by *postliminium.* And this was introduced by natural justice, so that a person wrongfully detained by foreigners might, when he had returned to his own country, recover his former rights. 1. A truce exists when, for a short and immediate period, it is agreed that [the two sides] shall not harass each other; at this time there is no *postliminium.* 2. Persons captured by pirates and brigands continue to be freemen. 3. A person is seen as having returned with *postliminium* when he enters our territories, just as he was lost when he went outside them. However, if he comes to an allied or friendly *civitas,* or to the court of an allied or friendly king, he is forthwith seen as having returned with *postliminium,* because it is there that he first, by the authority of the state, begins to be safe. 4. There is no *postliminium* for a deserter to the enemy; for the man who with evil counsel and a traitor's intention has left his *patria* is to be counted among [our] enemies. This though is the legal position in the case of a free deserter, whether a woman or a man. 5. If, however, a slave deserts to the enemy, then, because, on his accidental [re]capture, his master has *postliminium* over him, it is very correctly stated that there is *postliminium* even for him, namely that his master may recover his former right over him, lest the opposing legal right [of punishment] should be not so much injurious to the slave himself, who remains a slave in perpetuity, as it would represent a loss to his master. 6. If a *statuliber* deserter should return then, if the condition is satisfied after his return, he is made free. It is different should the condition have been fulfilled while he was with the enemy; for in that case it is not possible for him himself to return in order to be free, nor is there a right of *postliminium* over him for [his master's] heir, who cannot lay a complaint because he is not suffering any loss and the freedom [of the *statuliber*] would already be in effect, were it not prevented by the fact that he has become a deserter. 7. Again, a son-in-power who is a deserter cannot return with *postliminium,* not at least while his father is alive, because his father lost him in the same manner as did his country, and because military discipline was, for Roman parents, a more ancient tradition than love of children. 8. A deserter, however, is taken to be not only someone who goes over to the enemy in time of war but also someone who goes over after accepting a promise during a truce to [a people] with whom Rome has no friendship. 9. If he, who had bought [someone] from the enemy, assigns the right of pledge to another for a greater sum than he paid to ransom him, it is not that sum but the earlier one which the ransomed man must pay; and the buyer has an action on sale against him who sold. 10. *Postliminium* is for people whatever their sex or status; nor does it make a difference whether they are freemen or slaves. For those who return with *postliminium* are not only persons capable of fighting, but all who are of such a character that they can be of use, whether by giving advice or in other ways.

20 POMPONIUS, *Sabinus, book 36:* If a captive, who had been warned to return when there is peace, has remained with the enemy of his own free will, he does not thereafter have *postliminium.* 1. It is true that on the expulsion of the enemy from the lands which he has captured, their ownership returns to the previous owners, and they are neither confiscated nor fall by way of booty, whereas any field which may be captured from the enemy['s ownership] is confiscated. 2. Ransoming gives the opportunity of returning [home]; it does not affect the right of *postliminium.*

21 ULPIAN, *Opinions, book 5:* If anyone has with him a freeborn woman, ransomed from the enemy with the intention that he should get children by her, and subsequently

he manumits a son born to her, along with the mother, under the designation of his natural son, the ignorance of him as husband and father ought not to stand in the way of the true status of those whom he seemed to have manumitted; and it should be understood that the mother is released from the bond of pledge from the time when he had hoped to get children by her. Therefore, it is agreed that she, who returned with *postliminium*, free and freeborn, has produced a freeborn son. But if she was publicly recovered as booty by the valor of our soldiers, and the father did not pay a ransom for the mother to anybody, she is forthwith declared to have returned with *postliminium*, not with a master but with a husband. 1. In civil dissensions, although the state is often wounded by them, the contest is not fought for the destruction of the state; and those who go off to join one or other side are not counted as true enemies among whom the rights of captivity and *postliminium* apply. Accordingly, it has been agreed that it is quite pointless for persons captured, sold, and thereafter manumitted, to petition the emperor for the restoration of their freeborn status, since they had not lost it by any [true] captivity.

22 JULIAN, *Digest, book 62:* The property of persons who have fallen into the power of the enemy and there died, whether or not they have *testamenti factio*, belongs to those to whom it would belong if they had not fallen into the power of the enemy. And it is required by the *lex Cornelia* that there should be the same legal right and the same ground for action in all matters which there would have been if the persons, for whose inheritances and tutelages arrangements were made, had not fallen into the power of the enemy. 1. Therefore, it is apparent that all those same things which the person who has been captured by the enemy would have had, if he had returned with *postliminium*, belong to his heir. Furthermore, whatever the slaves of captured persons stipulate for or accept is understood to have been acquired for their masters, when they return with *postliminium*; for which reason [such things] must necessarily belong to those who enter upon an inheritance under the *lex Cornelia*. If, however, there should be no extant heir, under the *lex Cornelia* the property is confiscated. Again, legacies to [the captives'] slaves, whether with immediate effect or conditional, will belong to the heirs. Also if a slave should have been instituted heir by a third party, he can enter on the inheritance at the order of the captive's heir. 2. But if the son of the person who is in enemy hands accepts or stipulates for [anything], it is understood to have been acquired for himself if his father dies before returning with *postliminium*. Even if he should die while his father is still alive, it will belong to the father's heir. For the status of men whose fathers are in the power of the enemy is in suspense, and if the father should indeed return, [such a person] is reckoned as never having been *sui juris*, while if his father dies, he is reckoned as having been a *pater familias* as from the time his father fell into the power of the enemy. 2a. A *pater familias*, who had two sons-in-power and ten thousand in property, was captured by the enemy; one of the sons, having taken ten thousand, acquired another ten thousand. If the father had died in enemy hands, what should the sons have? The opinion was given that had the father returned, the ten thousand subsequently acquired would also have been his; but since he died in captivity, [the ten thousand] was not common property but belonged to the acquirer. The [original] twenty thousand, however, should be divided equally. 3. Property which slaves of captives possess under the heading of a *peculium* is in suspense; for if their masters return with *postliminium*, it is understood to become theirs as *peculium* again, while if the masters die there, it will belong to their heirs under the *lex Cornelia*. 4. If someone who has a pregnant wife falls into the power of the enemy and, after his son has been born and died, he dies there, his will is of no effect, because by such a chance happening the wills [even] of those who remained in the *civitas* are annulled.

23 JULIAN, *Digest, book 69:* If someone falls into the power of the enemy, leaving a pregnant wife behind, and his son born thereafter himself marries a wife and begets a son or daughter, and the grandfather then returns with *postliminium*, he will take all legal rights in the name of his grandchild, just as if he had been in the *civitas* when his son was born.

24 ULPIAN, *Institutes, book 1:* The enemy are those on whom the Roman people has publicly declared war, or who themselves [declare war] on the Roman people; others are termed robbers or bandits. Therefore, a person who is captured by brigands is not the brigands' slave, nor does he need *postliminium*; after capture by the enemy however as, say, by the Germans and the Parthians, he is the slave of the enemy and recovers his former status with *postliminium*.

25 MARCIAN, *Institutes, book 14:* The deified Severus and Antoninus wrote in a rescript that if a wife were captured by the enemy along with her husband and there gave birth by her husband, if they returned [together], they were parents and children in the eyes of the law, and their son was in his father's power, inasmuch as he had returned with the right of *postliminium*; but if [the child] were to return with his mother alone, he will be held a bastard, as if born without a husband.

26 FLORENTINUS, *Institutes, book 6:* It is of no concern in what manner a captive has returned, whether he was set free or whether he escaped from the power of the enemy by force or trickery, provided that he comes back with the intention of not returning thither; for it is not enough for a person to have returned home in body, if in spirit he is elsewhere. But those who are rescued on the defeat of the enemy are reckoned as having returned with *postliminium*.

27 JAVOLENUS, *From the Posthumous Works of Labeo, book 9:* Brigands had carried off your slave; subsequently, this slave came into the hands of the Germans; then, on the defeat of the Germans in battle, your slave had been sold. Labeo, Ofilius, and Trebatius say that he cannot be usucapted by the buyer, because the truth was that he was stolen; nor does the fact that he had been [a slave of] the enemy or had returned by *postliminium* prevent this.

28 LABEO, *Plausible Views, Epitomized by Paul, book 4:* If anything is captured in war and, having been lost, is recaptured in war, it is classed with booty and does not return by *postliminium*. PAUL: Not always. If [someone] captured in wartime flees home when peace has been made and then is [re]captured on the renewal of the war, he returns by *postliminium* to the person by whom he was captured in the earlier war, that is, if there is no agreement in the peace [treaty] that captives be returned.

29 LABEO, *Plausible Views, Epitomized by Paul, book 6:* If you have returned with *postliminium*, you have had no power to usucapt anything while you were in the power of the enemy. PAUL: Not always. If, while you were in that state, your slave possessed anything under the heading of *peculium*, you will be able to usucapt it at that time also since, even without our knowledge, we customarily usucapt such things. And it is in this way that the inheritance of a posthumous child who is not yet born or [an inheritance] not yet entered into is commonly increased through a slave of the inheritance.

30 LABEO, *Plausible Views, Epitomized by Paul, book 8:* If a thing of ours which the enemy captures is of such a kind that it can return by *postliminium*, then as soon as it has escaped from the enemy for the purpose of returning to us and has begun to be within the boundaries of our empire, it is to be reckoned as having returned by *postliminium*. PAUL: Not always. When the slave of a Roman citizen, after capture by the enemy, escapes from thence and is in the city of Rome, but in such a way that he is neither in the power of his master nor serving anyone else, it is to be reckoned that he has not yet returned by *postliminium*.

16

MILITARY LAW

1 ULPIAN, *Edict, book 6:* A soldier who is on leave is not seen as being absent on state business.

2 ARRIUS MENANDER, *Military Law, book 1:* Soldiers' crimes or offenses are either peculiar or common to other men; and accordingly, their prosecution is either peculiar or common. A peculiar military crime is one which a man commits in his capacity as a soldier. 1. It is reckoned a serious offense for a man, who may not lawfully do so, to enlist as a soldier; and [the seriousness] is increased, as with other crimes, by the status, the rank, and the type of service.

3 MODESTINUS, *Punishments, book 4:* The provincial governor, after giving a deserter a hearing, shall send him to [his] commanding officer with a written statement, except in the case where that deserter commits some more serious offense in the province in which he was found; for the deified Severus and Antoninus wrote in a rescript that he ought to be inflicted with punishment in the place where his misdeed was committed. 1. Soldiers' punishments are of such kinds as these: reprimand, money fine, imposition of duties, change of branch of the service, reduction in military rank, dishonorable discharge. For [soldiers] shall not be handed over to the mines or to the *opus metalli*, nor are they tortured. 2. A soldier absent without leave is one who, after absence for rather a long time, makes his own way back to camp. 3. A deserter is one who, after absence for a prolonged period, is brought back. 4. He who absents himself on reconnaissance in the face of the enemy, or who retreats from an entrenchment, should suffer capital punishment. 5. A man who abandons his post of duty is more than one absent without leave; therefore, he is corporally punished or reduced in rank according to the seriousness of his offense. 6. If anyone should abandon his guard duty over the governor or any superior officer, he shall suffer [the penalty for] the crime of desertion. 7. If anyone does not come back on the last day of his leave, he is to be punished, just as if he had gone absent without leave or had deserted, according to the length of time [he has been away]; [but this] after he has first been given the opportunity to show whether he has by ill-luck been delayed by various accidents on account of which he may appear to deserve pardon. 8. A man who has completed the term of his military service in desertion is deprived of his pension. 9. If a number of men together first desert and then return within a set period, they should be reduced in rank and posted to separate stations. New recruits, however, should be pardoned; but if they again commit this offense, they are visited with an appropriate punishment. 10. A man who has deserted to the enemy and has returned shall be tortured and condemned to the beasts or to the gallows, although soldiers suffer none of these [punishments]. 11. A man who intends to desert to the enemy and is caught suffers capital punishment. 12. However, if anyone is captured unexpectedly by the enemy while in the course of making a journey, then after the conduct of his previous [military] life has been examined he shall be granted pardon, and if he should return after the expiry of his term of service, he shall be restored to the status of a veteran and shall receive his pension. 13. A soldier who has lost or disposed of his weapons in wartime suffers capital punishment; by indulgence, he changes his branch of the service. 14. Anyone who has stolen another's weapons is to be reduced in rank. 15. In wartime anyone who has done something forbidden by his commanding officer or has not obeyed his orders suffers capital punishment, even if his action is successful. 16. However, a man who has fallen out of line is normally either beaten with rods or changes his branch of service according to the circumstances. 17. Also anyone who climbs over the ramparts or enters camp over the wall suffers capital punishment. 18. If, indeed, anyone has jumped over the *fossa*, he is discharged from the army. 19. The man who has incited severe unrest among the soldiers suffers capital punishment. 20. If the disorder stirred up was confined to a noisy argument or a trivial complaint, then he is reduced in rank. 21. And when many soldiers conspire together for some crime or if a [whole] legion defects, it is customary for them to be withdrawn from military service. 22. Those who have refused to protect their superior officer, or have deserted him, suffer capital punishment if he is killed.

4 ARRIUS MENANDER, *Military Law, book 1:* A man who is born with [only] one testicle or who has lost [one] can lawfully serve as a soldier in accordance with a rescript of the deified Trajan; for the generals Sulla and Cotta are recorded as having been in that condition by nature. 1. If a man condemned to the beasts escapes and enlists in the army, then, whenever he is detected, he is to suffer capital punishment; and the same [principle] is to be observed in the case of [such] a

man who permits himself to be enrolled. 2. A man deported to an island, who makes his escape and has enlisted in the army or, on being enrolled, has concealed the fact, should suffer capital punishment. 3. Temporary exile becomes relegation to an island for one who volunteers as a soldier [while under this penalty], while for a man called on to serve [while subject to exile] concealment [of his status brings] permanent exile. 4. If a person temporarily relegated has enlisted as a soldier on the completion of his period of banishment, the reason for his condemnation should be inquired into, so that if it involves permanent infamy, the same [principle] may be observed, [while] if it has been settled that for the future he can both return to the *ordo* and seek honors, he is not forbidden military service. 5. A person volunteering as a soldier who is guilty of a capital offense is, according to a rescript of the deified Trajan, to suffer capital punishment; nor is he to be sent back to the place where he was arraigned, but he is to be given a hearing insofar as the case is relevant to his military service. 6. If his case has been opened [in a civil court] or he is registered as "wanted," he is to be dismissed with ignominy and remitted to the [civilian] judge, and is not to be accepted thereafter as a volunteer soldier, even if he is acquitted. 7. Adulterers, or [men] found guilty in another criminal trial, are not to be accepted as soldiers. 8. Not everyone who is involved in a lawsuit, and accordingly joins the army, is ordered to be discharged, but [only] the man who has enlisted in the army with the intention that under the cloak of military service, he might make himself more expensive to his opponent. Pardon should not readily be given to those who have previously had the trouble of a lawsuit, but if it resulted in a settlement, pardon should be given. A person discharged on that account will not, of course, be infamous, nor is he, at the conclusion of the case, to be forbidden to enlist in the same branch of military service; as a general rule, should he drop the case or bring it to a settlement, he should be kept on [as a soldier]. 9. Our emperor wrote in a rescript that those who, after desertion, submitted their name for another branch of military service or allowed themselves to be levied, should be subject to military punishment. 10. It is, however, a more serious crime to evade the burden of military service than to seek it; for in olden times those who failed to answer the levy were reduced to slavery as betrayers of liberty. With the changed conditions of military service, however, there has been a departure from [such] capital punishment, since for the most part the numbers are made up with volunteer soldiers. 11. A man who withdraws his son from the army in time of war is to be punished with exile and [the loss of] part of his property; if in peacetime, it is ordered that he be beaten with rods, and if the youth is discovered or is produced by his father, [the youth] is to be handed over to an inferior branch of the service; for he who has allowed himself to be [thus] thrown off his course by another does not deserve pardon. 12. A command of the deified Trajan sentenced to deportation a person who had disabled his son to make him unfit for military service when the levy for war was announced. 13. The edicts of Germanicus Caesar counted a soldier who had been absent for a long time as a deserter, but it was subsequently laid down that if he had at any time had the intention of returning, he should be counted among those absent without leave. But whether [such a soldier] returns and gives himself up or whether he is arrested and handed over, he avoids the punishment for desertion; nor does it matter to whom he gives himself up or by whom he is arrested. 14. So the crime of absence without leave is treated more leniently, as is that of truancy among slaves, and that of desertion more seriously, as in the case of runaway [slaves]. 15. However, the reasons for absence without leave are always examined: why and where [the soldier] was, and what he was doing; and pardon is given for reasons of health, for the love of parents and relations, or if he was pursuing a runaway slave, or if there is some other reason of this kind. Also, allowance is made for a recruit still unaccustomed to discipline.

5 ARRIUS MENANDER, *Military Law, book 2:* Not all deserters are to be punished in the same way, but account is taken of their rank, their campaigns, their military grade, or where they are stationed, the duty that they have deserted, and their previous life; there is also the number, whether one person deserted alone, or with another, or with several others, or whether he added any other crime to that of desertion. Again, [account is taken of] the time for which he was in desertion, and of what was done subsequently. Again, if someone returns of his own free will, not under compulsion, his fate will not be the same. 1. A man who has deserted in peacetime, if he is a cavalryman, is to lose his rank, if an infantryman, changes his branch of the service. In wartime, there is capital punishment for the same offense. 2. A [soldier] who adds another crime to desertion is punished more se-

verely; and if he carries out a theft, it is to be reckoned as a second desertion, as [also] if he commits kidnapping or there is added an assault, or cattle-lifting, or something of the same kind. 3. If a deserter should be found in Rome he generally suffers capital punishment. If [he is] arrested somewhere else, he can be reinstated after the first desertion; for a further desertion he is to suffer capital punishment. 4. A person who has been in desertion, if he gives himself up, is, by favor of our emperor, deported to an island. 5. A [soldier] who has been captured and has failed to return when he had the power to do so is reckoned as a deserter to the enemy. It is also established that [a soldier] who is captured within our lines is in the same position; however, if someone is captured unexpectedly while making a journey or carrying a message he deserves pardon. 6. Hadrian wrote in a rescript that soldiers released by barbarians ought to be reinstated, if they should prove that they escaped after being captured, and that they had not deserted to the enemy. However, given that clear proof of this may not be possible, there must be an investigation on the basis of the evidence. If the man was previously rated a good soldier, this is a sound reason for believing his testimony; if he used to overstay his leave, or was negligent of his duties, or idle, or neglectful of his messmates, [his testimony] is not be believed. 7. If a [soldier] who was captured by the enemy comes back after a long time and it is established that he was captured and not a deserter to the enemy, he is to be reinstated as a veteran and takes his rewards and his pension. 8. The deified Hadrian wrote in a rescript that [a soldier], who deserted to the enemy and later apprehended a large number of brigands and identified [other] deserters to the enemy, could be spared; but that nothing should be guaranteed to someone who [only] promises to do such things.

6 ARRIUS MENANDER, *Military Law, book 3:* Every disorder committed to the prejudice of the common discipline is a military offense, as, for example, the crime of idleness, or of willful disobedience, or of sloth. 1. A man who has laid hands on a superior officer should suffer capital punishment. The crime of insolence is made more serious according to the rank of the superior officer. 2. All willful disobedience of a soldier toward the general or the provincial governor should receive capital punishment. 3. Whoever was first to flee from the line of battle must suffer capital punishment with [his fellow] soldiers looking on, by way of example. 4. Spies who have passed secrets to the enemy are traitors and pay the penalty with their heads. 5. Also a common soldier who feigns bodily weakness out of fear of the enemy is in the same case as he. 6. If anyone has wounded a fellow soldier, then if it was with a stone, he is dismissed the service; if with a sword, he commits a capital offense. 7. If a man has wounded himself or has attempted suicide in some other way, the Emperor Hadrian wrote in a rescript that the circumstances of the matter should be established, so that, if he had preferred to die out of inability to bear pain, or *taedium vitae*, or disease, or madness, or shame, the death penalty should not be inflicted on him, but he should receive a dishonorable discharge; but if he could put forward no such excuse he should suffer capital punishment. The capital penalty should be remitted to those whose misconduct was due to drink or jest, and change of service imposed. 8. A [soldier] who did not protect his superior officer, when he could, is to be reckoned in the same case as the perpetrator; if he could not have put up a defense, he should be spared. 9. Again, it has been accepted that the death penalty should be applied to those who have deserted their prefect or centurion when he was beset by brigands.

7 TARRUNTENUS PATERNUS, *Military Law, book 2:* Traitors and deserters to the enemy generally suffer capital punishment, and after being discharged are tortured; for they are counted as public enemies, not as soldiers.

8 ULPIAN, *Disputations, book 8:* Persons whose status is in dispute, even if they are in actual fact freemen, ought not, for the time being, to enroll for military service, especially if legal proceedings have been instituted, whether an action is being raised to reduce them from liberty to slavery, or the reverse. Nor should persons who, though of free birth, are serving as slaves in good faith [enlist], nor those who have been ransomed from the enemy until they have discharged their debt.

9 MARCIAN, *Institutes, book 3:* Soldiers are forbidden to buy estates in the provinces in which they are serving, unless the imperial treasury has sold off their ancestral property; for Severus and Antoninus have made an exception in favor of such cases. But when they have completed their full service, they are allowed to buy. An estate acquired unlawfully is claimed by the imperial treasury, if an information is laid. However, if before the case has

been denounced, his service has been completed or his discharge takes place, there is no scope for laying an information. 1. If soldiers are made heirs, they are not prohibited from possessing estates there.

10 PAUL, *Rules, sole book:* [A soldier] who deserts his guard duty over the *palatium* suffers capital punishment. 1. [A soldier] restored to the service following desertion can only receive his pay and gratuities for the intervening time if the liberality of the emperor grants him this as a special favor.

11 MARCIAN, *Rules, book 2:* Slaves are forbidden all military service; otherwise they suffer capital punishment.

12 MACER, *Military Law, book 1:* The duty of the commander of an army consists not only in leading but also in watching over discipline. 1. Paternus has also written that [a general] who is mindful that he commands armed troops ought to grant leave very sparingly, ought not to permit a stallion belonging to the army to be taken outside the province, nor dispatch a soldier on his own private business or out fishing or hunting. For in the *disciplina Augusti* provision is made in these words: "Even though I know that it is not inappropriate for soldiers to be employed on jobs as craftsmen, I nonetheless fear that if I should permit any such thing to be done for my convenience or yours, limits tolerable to me would not be imposed on this practice." 2. The duty of the tribunes, or of those commanding the army, is to keep the soldiers in camp, to lead them out on exercise, to keep the keys of the gates, to make the rounds of the sentries from time to time, to take part in foraging for their fellow soldiers, to examine the grain [ration], to chastise fraud by those measuring [it out], to punish offenses within the limits of their authority, to be present frequently at headquarters, to hear the complaints of their fellow soldiers, to inspect the sick.

13 MACER, *Military Law, book 2:* Soldiers are forbidden to buy land in the province where they carry out military duties, so that, as it were, they may not be distracted from their military service by an interest in farming; therefore, they are not forbidden to buy a house. Again, they can buy estates in another province. But it is not lawful for them to buy land, even in the name of another person, in a province to which they have come for the purposes of war; otherwise, it will be claimed by the imperial treasury. 1. However, a man who has bought land contrary to [this article of] discipline, if he has received his discharge without any question having been raised about the matter, is not allowed [thereafter] to be disturbed. 2. It is agreed that the benefit of this regulation does not apply to those who have been discharged with ignominy, because it is understood to be a concession to veterans by way of reward; and accordingly, it can be said to apply to a man who has been discharged on grounds of health, since he also is granted a reward. 3. The general circumstances of discharge are three: with honor, on grounds of health, and with ignominy. Honorable [discharge] is that which is granted when the term of military service is completed; that on grounds of health, when someone is declared insufficiently suitable for military service because of a defect of mind or body; circumstances of ignominy are when someone is released from his military oath on account of a crime. A man who has been discharged with ignominy is not able to live in Rome or to attend the imperial court. Even if [soldiers] are discharged without reference to ignominy, they are nonetheless understood to have been discharged with ignominy. 4. An insubordinate soldier is to be disciplined not only by his tribune or centurion but also by his commanding officer. The men of old branded with infamy the man who resists a centurion who is seeking to chastise him; if he has seized the rod of office, he changes his branch of the service; if he has deliberately broken it or laid hand on the centurion, he suffers capital punishment. 5. Menander has written that the escape of a man who gets away while under guard or in prison is not to be reckoned as classing him as a deserter, because he is a fugitive from custody not a deserter from military service. Paul, however, has written that the man who breaks out of prison and makes his escape, even if he has not previously deserted, should suffer capital punishment. 6. The deified Pius ordered a deserter, who had been given up by his father, to be transferred to an inferior branch of the service so that, he said, the father should not be seen as having delivered his son to his death. Again, the deified Severus and Antoninus ordered a man who gave himself up after five years' desertion to be deported. Menander has written that we should follow this example in other cases as well.

14 PAUL, *Military Punishments, sole book:* A man who has overstayed his leave is to be classed as either absent without leave or a deserter. Account, however, is taken of how many days late he was in returning, as also of the duration of his voyage or journey. If he

should prove that he was held up by sickness, or detained by brigands, or that he suffered delay from some similar accident, while at the same time proving that he did not set out so late from the place [where he was] that he could not arrive within the limits of his leave, he should be reinstated. 1. It is a serious crime to have disposed of one's weapons, and the offense is equated to desertion, certainly if [a soldier] has disposed of them all; as also a part of them, but a distinction is made. For if he [a soldier] has disposed of his shin-guard or shoulder-armor he ought to be punished with a flogging, but if of his cuirass, his shield, his helmet, or his sword he is akin to a deserter. Pardon will more readily be granted to a recruit for this crime, while generally speaking the blame is laid against the armorer if he has handed over arms to a soldier at an improper time.

15 PAPINIAN, *Replies, book 19:* [A soldier] after being made infamous for desertion and reinstated forfeits any payments for the time that he was in desertion. However, if there is an excuse and it seems that he was not a deserter, all his pay, without limitation of time, is returned.

16 PAUL, *Views, book 5:* A man, who enrolled in the army out of fear of a crime with which he had already been charged, is immediately to be released from his military oath. 1. A soldier who disturbs the peace suffers capital punishment.

17

PECULIUM CASTRENSE

1 ULPIAN, *Edict, book 14:* If the *peculium* of a son-in-power who was a soldier has remained with his father on the son's dying intestate, the father does not become his heir, but, however, he will become heir to any persons to whom his son was heir.

2 ULPIAN, *Edict, book 67:* Should a son-in-power who is a soldier die, then, if he was intestate, his property passes to his father, not as an inheritance but as a *peculium;* if, however, he had made a will, his *peculium castrense* is here treated as an inheritance.

3 ULPIAN, *Lex Julia et Papia, book 8:* If a woman leaves money to her husband's son, who is a soldier, to buy things for military life or perhaps for active service, these purchases at any rate come to be included in his *peculium castrense.*

4 TERTULLIAN, *Peculium Castrense, sole book:* A soldier ought to have exclusive rights in those things which he took with him into the army with his father's permission. 1. A son always has a right to bring an action and a claim over his military property, even against his father's wishes. 2. If a *pater familias* offers himself for adrogation, either during his military service or after his discharge, we shall have to see whether he also is to be understood as being permitted the administration of those things which he acquires on service before his adrogation; although the imperial constitutions speak [only] of those persons who are sons-in-power from the beginning of their service, this must be allowed.

5 ULPIAN, *Sabinus, book 6:* A soldier, who is a son-in-power, and who has been instituted heir by a fellow soldier or by someone whom he has come to know through his military service, may properly enter the inheritance at his own discretion, even without his father's command.

6 ULPIAN, *Sabinus, book 32:* If a wife gives [her husband, who is] a soldier and a son-in-power, a slave for the purpose of manumission, let us see whether the husband makes him his own freedman, since he could have both slaves and freedmen in his *peculium.* The better view is that this [freedman] is not included in his *peculium castrense,* because the wife was not known to [her husband] as a result of his military service. Clearly, should you put to me the case that the wife gave slaves to her husband as he was leaving for camp in order that he manumit them and have freedmen fit for military service, he can be said to grant them their freedom by manumission of his own free will without the permission of his father.

7 ULPIAN, *Edict, book 33:* If a husband has a *peculium castrense,* he will be condemned to pay insofar as he is able, because the better opinion is that he is obliged to make satisfaction from his *peculium,* even to creditors who are not connected with his military service.

8 ULPIAN, *Edict, book 45:* If it should happen that a wife or a blood relation or some other person not known to him through his military service gives anything or leaves a legacy to a son-in-power and states specifically that he is to have it as part of his *peculium castrense,*

can it be included in the *peculium castrense*? I think not; for we have regard, not to some person's pretence but to the truth, whether [or not] the acquaintanceship and affection did truly arise from his military service.

9 ULPIAN, *Disputations, book 4:* The case was put of a soldier, who was a son-in-power, who, having made his will, appointed a *heres extraneus* and then died during his father's lifetime. The father, while the instituted heir was still considering, himself died, and then the instituted heir refused the inheritance. To whom would the *peculium castrense* belong? What I said was that the *peculium castrense* of a son-in-power, if, indeed, he has died leaving a will, passes as an inheritance to the appointed heir, whether he appointed a *heres extraneus* or his father. However, when the son makes no declaration at all about his *peculium*, the assumption is not that it has now fallen to the father, but that it did not pass from him [in the first place]. In general, if a father writes in [his will] freedom for a slave who accompanies his son during his military service, and the son then dies in his father's lifetime, there is no obstacle to that freedom although, if the son survives the father, there would be an obstacle. From this, Marcellus thinks that it is possible to make a slave, belonging to a son's *peculium*, *heres necessarius* to the father, if the father survives the son. I gave the same reply in the case where the father leaves as a legacy something belonging to his son's *peculium*; for in the same circumstances in which we have said that the freedom is valid, the legacy also will either be due or will be barred. After these preliminary remarks in the case put forward, I said that since the heir did not enter upon the inheritance, the *peculium* reverted to [being] the property of the father; and from this it can also be stated that the father's property has been augmented by this refusal. Nor is it unheard of for someone to seem to have had a successor as a result of a later event. For if the son of a man captured by the enemy dies while his father is alive in captivity, then, should the father return, [the son] would possess the *peculium* as being a son-in-power; if, though, the father dies in that same place, the son will, as a *pater familias*, have a successor according to the civil law; and his successor is regarded as having possessed retrospectively those things as well which that son acquired meantime, and they will not be seen as having been acquired for the father's heir, but for the son himself.

10 POMPONIUS, *Rules from Marcellus's Notes, sole book:* It is agreed that nothing is owed to fathers from the military property of their sons.

11 MACER, *Military Law, book 2:* The *peculium castrense* is that which is given by parents or blood relations to a man engaged in military service, or that which a son-in-power has himself acquired in the army, and which he would not have acquired had he not served. For what was acquired outside military service is not a man's *peculium castrense*.

12 PAPINIAN, *Questions, book 14:* A father who gives his son, who is a soldier, in adoption cannot take away from him the *peculium* which the son has once held by right of military service. Nor, on this reasoning, does he by emancipating the son take away from him the *peculium* which he could not take away from [a son who] remained in the family.

13 PAPINIAN, *Questions, book 16:* The deified Hadrian wrote in a rescript of a man whom his wife had instituted heir while he was a son-in-power and in the army, that he was the heir and that slaves of the inheritance manumitted by him became his own freedmen.

14 PAPINIAN, *Questions, book 27:* If a son-in-power who is a soldier dies as a prisoner in enemy hands, the *lex Cornelia* will come to the aid of his appointed heirs; if they should withdraw, the father will have the *peculium* by virtue of his original right. 1. It appears to be a very similar instance when the appointed heirs are still deliberating, so that whatever meantime a slave has stipulated for or has had delivered to him by a third party, so far as it relates to the father's person, seems to be of no validity if it happens that the *peculium* remains with the father, because he was not at that time the slave of the father. But as regards the appointed heirs, the delivery, as also the stipulation, is understood to have been in suspense; for the effect is that once the inheritance has been entered, [the slave] is considered to have belonged [from the beginning] to the inheritance. However, respect for fatherhood moves us to the extent that in that class of case where the *peculium* remains with the father by his original right, he also acquires through the slave [a right] in the stipulation or in the thing delivered. 2. The legacy which was left to that slave, although, because of uncertainty, it was not then acquired by anyone, will, once the will has been discarded, then for the first time be acquired for the father through the slave although, had it been acquired for the *peculium* on the model of an inheritance, the right of the father would nowadays not be considered.

15 PAPINIAN, *Questions, book 35:* That which a father gives to his son, who is a soldier, on his return [from the army] he does not make part of the *peculium castrense* but of his other *peculium,* just as if the son had never served in the army. 1. If the son stipulates for [something] and [the father] promises [it], the stipulation will be valid if it is on account of the *peculium castrense*; but if it is on any other account, it will not be valid. 2. If the father stipulates for [something] from his son, the same distinction will be preserved. 3. If a slave who is part of the son's *peculium* should stipulate for [something] from a third party or receive something by delivery, the thing will belong to the son without defining the title; for as the son does not shoulder the dual duty of father and son-in-power, so the slave, who is part of the *peculium castrense* and not, so long as the son lives, subject by any rule to the father, can straightforwardly acquire something for the father by stipulation or by acceptance. This reasoning persuades us that if the slave who belongs to the son stipulates for [something] from the father on any grounds or accepts something as delivered, the thing and the stipulation are thus acquired for the son, just as if it had been an outsider who had made the promise, because the legal personality of the one who stipulates and who accepts is such that, without distinction of title, what is done through him looks to the benefit of the son. 4. If the father loses the usufruct in a slave who was owned by his son in his *peculium castrense* the son will have the full ownership.

16 PAPINIAN, *Replies, book 19:* I gave the opinion that a dowry given or promised to a son-in-power is not within his *peculium castrense.* This will not be seen as contrary to the fact that in the time of the deified Hadrian, it was agreed that a son-in-power, who was a soldier, had been heir to his wife and had possessed the inheritance for his *peculium castrense.* For an inheritance is obtained by a right other than from one's parents, but a dowry, being [legally] united to a marriage, is given for the burdens of the marriage and for its children, who are in the power of their grandfather. 1. I gave the opinion that an inheritance which one first cousin on the father's side, who was serving in another province, left to another such cousin with whom he had never served, did not appear to have been obtained for the *peculium castrense*; for it was the consideration of blood, not reasons of military service, which had earned the right to take the inheritance.

17 PAPINIAN, *Definitions, book 2:* A father who is going to keep the *peculium castrense* of his intestate son is compelled by praetorian law to pay the debts within the limits of [the *peculium*] and within the *annus utilis.* The same [father], if he is the heir appointed in a will, will be liable in perpetuity as heir to actions under the *jus civile.* 1. A father, instituted as heir by his son, who is a soldier or who has served as a soldier, has abandoned the claim of the will and possesses the *peculium castrense*; he will be liable in perpetuity, on the model of an heir under the *jus civile,* to pay legacies up to the limit of the *peculium.* But if a son has died a year [or more] after leaving the army, having made a will under the *jus commune,* then, out of regard for the [*lex*] *Falcidia,* one quarter will be retained. But if the father has abandoned the claim of the will, when the *peculium* was not [sufficient] to pay off the creditors, he will not be regarded as having acted in any way fraudulently, although he may encounter a saving of time.

18 MAECIAN, *Fideicommissa, book 1:* A slave who is part of a *peculium castrense* can be instituted heir by the father, and he makes the son *heres necessarius* to the father. 1. In general, those acts of a father are barred which produce the immediate alienation of any right arising from the *peculium castrense*; those acts, however, which do not generally have an immediate effect but do so subsequently, will be given consideration at the time at which they customarily take effect, so that if the son who is being deprived is [still alive], the act is invalid; if, however, he has died previously, the father's act is not barred. 2. Therefore, we shall deny that a father, in raising the action for dividing common property while the son is alive, may alienate property, for example, dotal land. Again, if a partner should of his own accord raise an action against him, whatever action is taken will not be valid, just as if he were raising an action against someone excluded from the administration of the property. 3. The father [of a soldier] can free slaves of that *peculium* from a usufruct, as also landed estates either from a usufruct or from other servitudes; and also he can acquire servitudes for [their benefit]. For it is true also that a person who is excluded from the [administration of his] property can achieve [these things]. But the father cannot impose a usufruct or a servitude on slaves of that *peculium* nor on its landed estates. 4. If at any time the son shall possess in good faith another party's property as part of that *peculium,* ought his father to be liable to an action *in rem* or for production, as [he would] with his other sons? The truer view is that since this *peculium* is distinct from the father's property, the

requirement of making a defense should not be imposed on the father. 5. And the father should not be compelled to defend an action on the *peculium* on account of a debt which the son is said to have incurred on the head of the *peculium* which he has acquired in the army. But if [the father] should submit to proceedings of his own free will, he must defend his son like any other defender by giving personal security for the whole sum, not [merely] within the limits of the *peculium*. Moreover, he can bring actions in the name of that son only if he gives security that [the son] will give ratification.

19 TRYPHONINUS, *Disputations, book 18:* Our colleague Scaevola used to have doubts about an inheritance given by someone who is both an agnate and a fellow soldier, because on the one hand he could have given it before [their joint service] as an acquaintance and a friend, or [on the other] he could have refrained from giving had not their common service increased his affection. It seems to us that if the will was made before their common service, the inheritance does not form part of the *peculium castrense*; if afterward, the reverse. 1. But if a slave of the *peculium castrense* is appointed as heir by anyone, then at the command of the soldier he shall be required to enter upon the inheritance, and it will become part of the property in the *peculium castrense*. 2. A son-in-power, having become a civilian, made a will disposing of his *peculium castrense* and died in ignorance of the fact that he had been *suus heres* to his father. He cannot be seen as having died testate as regards his military property and intestate as regards his paternal property, although there has even now been a rescript to that effect in the case of a [serving] soldier, because a soldier had been able from earliest times to die partly testate and partly intestate; but this man does not have the right to make a will other than with proper legal usage. Of necessity, therefore, the appointed heir to the *peculium castrense* will take the entire property, just as if a very poor man had died after making his will, in ignorance of the fact that he had been made rich by the agency of his slaves carrying on business in another place. 3. A father ordered in his will that a slave who was part of his son's *peculium castrense* should be free; on his son-in-power dying intestate, followed shortly by the father, is the slave's freedom competent? For the objection was that ownership [of the slave] as a whole could not belong to two persons [at once]. Hadrian, indeed, laid down that a son could manumit a slave who is part of such a *peculium*; and if the same slave had received his freedom both in the father's will and in that of the son, and both alike had died, there should be no doubt that he was free under the son's will. However, in the above, is it really possible that these things can be said about the freedom granted by the father? To the extent that the son uses the right granted him [by law] over his *peculium castrense*, to that extent his father's right ceases to have effect; but if the son dies intestate, his father, in imitation of a kind of *postliminium*, owns the *peculium* by his former right, and he is regarded as having had retrospective ownership over the property. 4. However, if by chance he laid the staff [of freedom] on the slave as heir [to his son] in the son's lifetime, it may not be said that the [slave] was made free by that manumission on the death of the son intestate. 5. But what if the son makes a will and his inheritance is not entered upon? It is not so easy [as in the previous instance] to say that the ownership of the property in the *peculium* is continued for the father after the son's death when meantime, while the instituted heirs are considering, [the son] has produced the semblance of a succession. Otherwise, if the inheritance of the son were entered upon by the instituted [heir], it will be said that the property has passed to him from the father, which is absurd. What if in the meantime, in this instance as in the others, we so view the ownership that we can regard it as either having belonged retrospectively to the father or not as having so belonged, according to what happened subsequently? On this principle, [however,] if, while the heirs are considering [whether to accept], time begins to run for the granting of a legacy to the slave who was part of that *peculium* under a will from which the father had been unable to take anything, it will be difficult to explain whether [the legacy] belongs to [the father] himself, [or not,] since it would assuredly belong to the son's heir. Consideration of the slave's freedom, however, is easier in that instance where the son is assumed to have died intestate. Surely, there is therefore no ground for the opinion that that liberty, granted [by the father] at the time when the [slave] was not in the father's ownership, is valid? However, we do not, in either event, refuse a judgment to the opposite effect, that is, favorable [to freedom].

20 PAUL, *Regula Catoniana, sole book:* But if you suppose that a son has made a will and has

instituted his father heir, although, indeed, the father had in his will granted freedom to his son's slave, who began to belong to him under his son's will, we must see whether [this slave's position] can be said to be compared with [that of a slave] who was the property of another at the time of his manumission and was then subsequently acquired. The favorable interpretation is to allow the freedom left [him] by the father; and that he is seen as having been the father's property from the beginning is shown by what happened subsequently.

18

VETERANS

1 ARRIUS MENANDER, *Military Law, book 3:* The privilege of veterans has among other things the prerogative that, even in criminal offenses, they are distinguished from others in their punishments. Therefore, a veteran is not thrown to the beasts nor beaten with rods.

2 ULPIAN, *Opinions, book 3:* The exemption [from public burdens] granted to those who have been honorably discharged from their military oath holds good even in those *civitates* in which they live; nor is that [exemption] undermined if one of them undertakes an office or a public duty of his own free will. 1. All persons are liable to pay [land] taxes and to support the religious burdens of their patrimonial estates.

3 MARCIAN, *Rules, book 2:* Veterans and their children have the same honorable status as decurions; accordingly, they shall not be condemned to the mines, nor to forced labor, or to the beasts, and they are not beaten with rods.

4 ULPIAN, *Duties of Proconsul, book 4:* A rescript sent to the veteran Julius Sossianus stated that veterans are not exempt from the duty of paving the road. For it is clear that veterans are not excused from contributions which arise from their possessions. 1. It was also stated in a rescript to the veterans Aelius Firmus and Antoninus Clarus that their ships could be requisitioned.

5 PAUL, *Judicial Examinations, sole book:* The deified Great Antoninus and his father wrote in a rescript that veterans are excused from ship-building. 1. They also have exemption from the collection of [personal] taxes, that is, they may not be made collectors of taxes. 2. But veterans who have allowed themselves to be appointed to the *ordo* [of decurions] are compelled to discharge the duties.

BOOK FIFTY

1

MUNICIPES AND FOREIGN RESIDENTS

1 ULPIAN, *Edict, book 2:* Either birth or manumission or adoption makes a man a *municeps*. 1. And, indeed, properly speaking those are called *municipes* who share in *munera*, who have been admitted to *civitas* in order to perform *munera* with us; but now we loosely call *municipes* the members of any particular community, as for instance, Campani or Puteolani. 2. So anyone who is born from two parents who are Campani is a Campanus. But if he is born from a father who is a Campanus and a mother who is a Puteolana, he is still a *municeps* Campanus, unless it happens that by some special dispensation the place of origin of the mother is taken into account; for then he will be a *municeps* of the place of origin of the mother. Thus, for instance, it has been granted to the Ilienses that anyone who is born from a mother who is an Iliensis is one of their *municipes*. This dispensation has also been granted to Delphi and also still exists there. Celsus also reports that the people of Pontus, by a grant of Pompeius Magnus, can regard anyone who is born from a mother from Pontus as being from Pontus. Some people hold that this grant only relates to children born out of wedlock; Celsus, however, does not agree with this view. For it would not have been necessary to observe that a child born out of wedlock should have the status of the mother; for what other provenance can such a person have? But the grant relates to those who are born from parents of different communities.

2 ULPIAN, *Disputations, book 1:* Whenever a son-in-power is made a decurion at the wish of the father, the father is subject to all the *munera* which are imposed on the son as decurion, as verbal guarantor for the son. The father is regarded as having agreed to the decurionate of the son if he was present and did not oppose the nomination. Thereafter whatever the son does in the public sphere, the father will be on call as verbal guarantor. 1. We must treat as done in the public sphere handling public money or decreeing its expenditure. 2. And even if he appoints curators of public works or anything else, the father will be liable. 3. And even if he nominates a successor for himself, he makes his father liable. 4. And even if he contracts out the collection of the public revenues, the father will be liable. 5. But if the son fails to assign tutors or chooses unsuitable ones, or fails to make adequate inquiry or accepts someone unsuitable, there is no doubt that he himself is liable; the father, on the other hand, is indeed only liable if verbal guarantors are also normally liable in this context. But they are not normally liable, because verbal guarantors undertake that public property will suffer no damage and it is of no relevance to public property whether tutors are assigned to *pupilli*, at any rate as far as financial matters are concerned (this is what is taught and it is the subject of rescripts). 6. Anyone who is absent longer than his leave of absence or than the terms established for leave of absence may be summoned to undertake *munera*.

3 ULPIAN, *Sabinus, book 25:* It is thought right for sons-in-power also to be able to have a domicile.

4 ULPIAN, *Edict, book 39:* Not indeed wherever his father has it, but wherever he himself fixes his domicile.

5 PAUL, *Edict, book 45:* Labeo holds that anyone who engages in business equally in a number of different places does not have a domicile anywhere; he admits, however, that some people say that such a person is an *incola* or has a domicile in a number of different places, which is closer to the truth.

6 ULPIAN, *Opinions, book 2:* The assumption of a false origin does not alter the truth of a real one; for a true origin is not erased or lost by the error or the falsehood of someone who says that he comes from somewhere not in fact his place of origin. The truth cannot be changed by someone denying his *patria*,

which is his place of origin, or by someone lying about a *patria* which is not his. 1. The son adopts the *civitas*, which follows from the real origin of the father, not his domicile. It was thought right by earlier jurisprudents for someone to be able to have a domicile in two places, if he so established himself in both places as not to seem of less fixed abode in either place. 2. Freedmen adopt the origin or the domicile of their patrons, likewise their offspring.

7 ULPIAN, *Duties of Proconsul, book 5:* If anyone is manumitted by several people, he adopts the origin of all his patrons.

8 MARCIAN, *Criminal Proceedings, book 1:* Antoninus and Verus issued a rescript to the effect that decurions were not to be forced to provide corn to their fellow citizens at less than the market price; this is also laid down in other imperial *constitutiones*.

9 NERATIUS, *Parchments, book 3:* The prime origin of someone who has no legitimate father is derived from the mother and must be regarded as effective from the day on which she bore him.

10 MARCIAN, *Informers, sole book:* No community has the same right as the imperial treasury over the goods of a debtor, unless this has been explicitly granted by the emperor.

11 PAPINIAN, *Questions, book 2:* The Emperor Antoninus issued a rescript to Lentulus Verus to the effect that the office of a magistrate was not in any way divided and that their liability was a joint one. This is to be understood in the sense that liability is indeed only imposed on a colleague if the business in hand cannot be completed by the man who undertakes it or by those who are his sureties and he cannot pay even after his term of office is over; otherwise, if the person or *cautio* is satisfactory or he can pay at whatever time may be agreed, the administrator responsible is the only person liable. 1. Now if by chance someone who nominated a magistrate at his own risk is solvent, should an action be granted first against him, as if against a verbal guarantor, or, on the other hand, only if the business in hand cannot be completed by a colleague? It was thought right on this analogy of a verbal guarantor that someone who nominated a magistrate should be sued first, since a colleague is involved only because of negligence and fraud, whereas someone who nominated a magistrate is involved by way of a guarantee.

12 PAPINIAN, *Replies, book 1:* And it is not expedient for an *actio utilis* to be granted him against a colleague of the man who was nominated.

13 PAPINIAN, *Questions, book 2:* What, then, if one of two magistrates is away for the whole year or if, despite being present, he does not undertake business in the public sphere because of ill-will or incompetence or ill-health and his colleague administers everything by himself, but cannot complete the business in hand himself? This is the order in which to proceed: First of all the man who did undertake business in the public sphere and those who acted as his sureties should be sued for the total sum; then, when they have all been exhausted, the man who nominated an unsuitable magistrate must accept liability and finally the other of the two magistrates, who did not undertake business in the public sphere. Nor will he who nominated the magistrate be right if he rejects liability for the whole matter, since he should have realized that he who was nominated would undertake an office as an undivided and a joint liability. For even if both did undertake business and what was necessary could not be done by the one, he who nominated his colleague would be involved for the whole matter.

14 PAPINIAN, *Questions, book 15: Municipes* are regarded as knowing what is known by those to whom the highest affairs of the community are entrusted.

15 PAPINIAN, *Replies, book 1:* Someone who has been removed from the *ordo* of decurions for a time and then returned is not admitted to officeholding for as long as he lacks the rank [of decurion] by analogy with someone who has been banished. But in both cases, it was thought right for there to be an examination of the offense for which the men in question suffered a sentence of that kind. For those who suffer the more severe penalties may later be relieved of censure on the grounds that the affair is over, while those who suffer penalties less severe than the laws allow may nonetheless remain among those branded with *infamia*, since the investigation of facts lies within the capacity of the judges, but not the authority of the law. 1. It is not right for an

action to be granted against a man who nominated his successor at his own wish, if after the magistracy is completed the successor turns out to have been satisfactory. 2. Property transferred by tacit agreement in order to avoid civil *munera* is forfeit to the imperial treasury, and a sum equivalent to what has been forfeited must also be paid by the transferee from his own property. 3. The rule of origin in engaging in officeholding and undertaking *munera* is not changed by adoption; but the son is constrained to undertake in addition new *munera* through his adoptive father.

16 HERMOGENIAN, *Epitome of Law, book 1:* But if someone is emancipated by his adoptive father, he not only ceases to be his son but also a citizen of that community of which he had become a member by adoption.

17 PAPINIAN, *Replies, book 1:* A freedman is not excused from civil *munera* on account of his patron, nor is it relevant to the case whether he is performing tasks for his patron or service for someone who is blind. 1. The freedmen of senators, however, who are managing the affairs of their patrons, are relieved of tutelage by decree of the senate. 2. Let us assume that a father wished his son to be decurion; the community must sue the son in his own person before the father in appendage to the person of the son; nor will it be relevant to the case if the son possesses only a *castrense peculium*, whether he served in the army before or after. 3. The prescribed intervals, which apply to the repetition of an office or the undertaking of another, related to one community and not to a combination of communities. 4. But the same person must not hold office in two communities at the same time; so when office is conferred at the same time in both places, origin provides the grounds which decide acceptance. 5. The mere grounds of ownership of property are not adequate for the imposition of civil *munera* on the owner in question, except in the case of a special dispensation granted expressly to the community. 6. Those who have returned to their *patria* by *postliminium* are forced to undertake *munera*, even though they live within the territory of another community. 7. The *munus* of raising tribute is not regarded as being among the base *munera* and so is imposed also on decurions. 8. Someone who is manumitted on the grounds of a *fideicommissum* adopts the origin of the manumitter in matters of civil *munera*, not of the man who bequeathed him his liberty. 9. The deified Pius thought it right to reply that one taken into an adoptive family should also perform public services in the place of origin of his natural grandfather, although not even a suspicion of fraud was at stake in his case. 10. The error of someone who thinking that he was a *municeps* or colonist promised to undertake civil *munera* does not exclude the claim of the law. 11. The domicile of the father does not bind a son who is the *incola* of another community to perform civil *munera* in a community not his own, provided that as far as the person of the father is concerned the nature of his domicile is only temporary. 12. It is not proper for those who are cited in court for capital offenses to be admitted to further office before the case is finished; but they retain their earlier rank in the meanwhile. 13. The mere possession of a house, which is acquired in another community, does not constitute domicile. 14. The risk involved in nominating a successor does not involve the verbal guarantor of the man nominating. 15. Verbal guarantors who have sworn that any loss of public property will be indemnified and those who nominate magistrates at their own risk are not liable to any penal action to which those for whom they have acted become subject. For it is enough for loss to the community to be made good, which seems to be what is being promised.

18 PAUL, *Questions, book 1:* The deified Severus issued a rescript to the effect that intervals in time between successive offices are a concession to the unwilling, not also to the willing, always provided that no one may repeat an office without a break.

19 SCAEVOLA, *Questions, book 1:* What the majority of the senate decides is treated as the decision of the entire body.

20 PAUL, *Questions, book 24:* Domicile is transferred by actual action, not by mere assertion, as is established in the case of those who say that they cannot be called on for *munera*, since they are *incolae*.

21 PAUL, *Replies, book 1:* When Lucius Titius was in the power of his father, he was appointed by the magistrates as a curator, along with others, for the purchase of corn against the wishes of his father; Lucius Titius did not agree to the appointment and did not receive the money and did not provide sureties for it or involve himself in the purchases along with

the others; and after the death of his father, he began to be approached for the debts of his colleagues. The question is whether he can be held liable on such grounds. Paul replies that someone who declined to undertake a *munus* imposed by the magistrates can be sued under this head on account of loss to the community, even though at the time when he was appointed he was in the power of another. 1. Paul also replies that those who are sued on behalf of others not as a result of a contract, but as a result of the office which they have held are usually involved to the extent of the amount of the loss, but not also for interest. 2. He also replies that the heirs of a man cannot legally be sued on account of the *munera* of a son, which he undertook after the death of his father. This reply also covers someone who, although made a decurion by his father, undertook the *munera* after the death of his father. 3. Paul also replies that someone who has adopted a decurion is regarded as having accepted the burdens of his decurionate on the analogy of a father at whose wish his son has been made a decurion. 4. Paul also replies that during a marriage the dowry forms part of the goods of the husband; but further, if people are called on for municipial *munera* above a certain property level, the dowry ought not to be reckoned in. 5. Paul also replies that even if an accuser in a case involving a capital offense had not arranged for the offense to be dealt with within a year, the defendant should not have sought office in the meanwhile. 6. The Emperors Severus and Antoninus, Augusti, to Septimius Zeno. As concerns the infant son, whom you wished to be decurion, although you have bound your credit for the future, you should not, in the meanwhile, be forced to undertake the burdens, since you seem to have expressed your will over things which can be mandated. 7. Paul also replies that if a community has no specific law about the admission of adjudications, it is not possible to withdraw from a renting out or sale of public property once it is completed; for the times laaid down for adjudications relate to cases involving the imperial treasury.

22 PAUL, *Views, book 1:* The sons and freedmen of freedmen adopt the domicile and origin of their father or manumitting patron respectively. 1. A widowed woman retains the domicile of the husband she has lost on the analogy of a woman who has become a *clarissima persona* because of her husband. But both domicile and origin change if a second marriage takes place. 2. Freedmen are *municipes* also in the place in which they have themselves established domicile of their own volition; nor does this involve any prejudice to the origin of the patron; and such freedmen are bound to perform *munera* in both places. 3. Someone who has been exiled has a temporary domicile under constraint in the place to which he has been exiled. 4. A senator who is removed from the *ordo* is not restored to his original *patria*, unless he has specially been granted this. 5. Senators and their sons and daughters, at whatever time they are born, likewise their grandsons and great-grandsons if on a son's side, are detached from their origins, although they retain their rank and their municipalities. 6. Senators who have been granted freedom of movement, that is, the right to live where they wish, retain domicile at home. 7. Those who lend at interest must fulfill all the payments of tax due on their *patrimonium*, even if they do not have possession.

23 HERMOGENIAN, *Epitome of Law, book 1:* Someone who attains senatorial rank ceases to be a *municeps*, as far as *munera* are concerned, but as far as his status is concerned, he is regarded as retaining his origin. Finally, those who are manumitted by him are made *municipes* of the municipality from which he originates. 1. A soldier is regarded as having his domicile where he serves, if he has no possessions in his *patria*.

24 SCAEVOLA, *Digest, book 2:* The constitutions of the emperors contain the provision that interest is not due on money which is paid to make good a loss. And, therefore, the Emperors Antoninus and Verus issued a rescript in these words: "It is humane that interest on debts should be exacted neither from the man who is indebted as a result of the administration of his office nor from his verbal guarantor and even less

should it be exacted from the magistrates who accepted the *cautio*; it follows from this that no deviation should be made from the customary rule in the future either."

25 ULPIAN, *Praetor's Edict, book 1:* When municipal magistrates administer the magistracy, they then undertake the task of one man; and this is usually in fact laid down for them in the *lex municipalis*; but even if it is not, as long as it is not excluded, it fits what is customary.

26 PAUL, *Edict, book 1:* A municipal magistrate cannot do those things which pertain more to *imperium* than to jurisdiction. 1. *Restitutio in integrum* is not within the competence of a municipal magistrate, nor an order for possession of goods to preserve either property or dowry or legacy.

27 ULPIAN, *Edict, book 2:* A man who is manumitted is fellow *municeps* of the man who manumitted him, adopting not his domicile, but his *patria*. And if he has as *patronus* a *municeps* of two communities, he will by manumission be a *municeps* of those two communities. 1. If anyone conducts his business not in a colony, but always in a municipality, sells, buys and contracts there, frequents the forum, bath and entertainments there, celebrates festivals there, in fact enjoys all the facilities of a municipality and none of those of colonies, he is regarded as having his domicile rather there than where he goes in order to cultivate [the land]. 2. Celsus, in the first book of his *Digest*, discusses the case of someone who is equally at home in two places and does not spend longer in the one than the other; one must establish where he has his domicile from his full intention. I myself doubt, if someone lives in both places with full intention, whether he can have a domicile in two places. It is true that it is possible to hold two, but it is difficult, just as it is difficult for anyone to be without a domicile. I think, however, that even this can happen, if someone leaves his domicile and travels by sea or land, seeking somewhere to go and establish himself; I think that such a person has no domicile. 3. However, even an exile can have a domicile in that place from which he is excluded, as Marcellus writes.

28 PAUL, *Edict, book 1:* Action will be taken before the municipal magistrates also between those who agree about the greater part [of what is at issue].

29 GAIUS, *Provincial Edict, book 1:* An *incola* must obey both the magistrates of the place where he is an *incola* and those of the place where he is a citizen; nor is he subject only to municipal jurisdiction in both municipalities, but he must also perform all public *munera*.

30 ULPIAN, *Edict, book 61:* Whoever is born in a village is regarded as a member of the *patria* to which the village in question belongs.

31 MARCELLUS, *Digest, book 1:* There is no barrier to anyone having his domicile where he wishes, provided somewhere is not forbidden to him.

32 MODESTINUS, *Distinctions, book 4:* A woman who is betrothed does not change her domicile before the marriage is contracted.

33 MODESTINUS, *Manumissions, sole book:* Rome is the common *patria* of us all.

34 MODESTINUS, *Rules, book 3:* An *incola* who has been designated for the performance of public *munera* cannot renounce his position unless the *munus* has been completed.

35 MODESTINUS, *Grounds for Release, book 1:* One must realize that someone who remains in the country is not regarded as an *incola*; for someone who does not use the facilities of the city in question is not therefore regarded as being an *incola*.

36 MODESTINUS, *Replies, book 1:* A letter was sent to Titius by the magistrates of his *patria*, when he was in Rome for his studies, asking him to offer to the emperor a decree of the community in question, which had been sent with the letter. However, the man who had undertaken to deliver the letter coming to a secret understanding gave it to Lucius Titius, who was himself also at Rome for his own purposes; he removed

the name of Titius, wrote his own name instead, and so gave the decree to the emperor according to the mandate of the community. The question arises of who could have asked for a traveling allowance from it; and also what is considered to be the offense of the man who did not give the letter to the person for delivery to whom he had accepted a mandate and of the man who gave the decree to the emperor as if he himself had been instructed by his *patria*, having removed someone else's name and written his own instead. Herennius Modestinus replies that Titius could not ask for a traveling allowance, but rather the man who wrote his own name. 1. Titius accepted a pledge for public money which he himself lent out, having made an agreement with the borrower that if the debt were not paid the pledge would be forfeit without any counterpromise. Magistrates succeeding to the place of Titius recognized the debt and the pledge, down to Maevius. When the pledge was sold, it was not enough to cover the debt, because of a counterpromise made by the magistrates to the sellers concerning the established extent of the land. The question is who is liable to the community. Herennius Modestinus: "I replied that Titius was not bound in respect of this debt because his successors accepted the risk of the debt; but nor are the magistrates who sold [the pledge] involved, since of course they sold it for more because of the evidence for the size of the land and were ordered to restore the difference in price when the lesser extent of the land was realized. So the man who most recently approved the debt must make good the loss of the community unless he can be shown to have transmitted the debt to a satisfactory successor.

37 CALLISTRATUS, *Judicial Examinations, book 1:* Examination of the rights of all *incolae* whom any community claims, lies with the provincial governors. But when anyone claims that he is not an *incola*, he must appear before the governor of the province in whose care lies the community which is calling on him for *munera*, not in the province of the community from which he himself claims to originate. This is the purport of a rescript of the deified Hadrian. 1. The freedmen of a woman who is born in one place and married in another must perform their *munus* in the place from which she, their patron, comes and where they themselves have their domicile. 2. One must realize that women who have not given themselves in statutory marriage must perform *munera* where they themselves originate and not where their husbands originate. This is the purport of a rescript of Antoninus and Verus.

38 PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus, Augusti, issued a rescript to the effect that they gave a dispensation from the oath to a man who had sworn he would not be a member of the *ordo* and was later made *duumvir*. 1. They also issued a rescript to the effect that it was right for tenants of estates of the imperial treasury to perform *munera* provided the imperial treasury did not suffer and that it fell to the governor in association with the procurator to examine the issue. 2. The Emperors Antoninus and Verus issued a rescript to the effect that it was part of the duty of magistrates to exact the money of a legacy and that if they failed, they or their heirs were to be sued or, if they could not pay, their verbal guarantors or those who went surety for them. 3. They also issued a rescript to the effect that a woman as long as she was married was regarded as an *incola* of the community to which her husband belonged and was not compelled to perform *munera* in the place of her origin. 4. They also issued a rescript to the effect that the property of a father who had emancipated his son specifically in order not to stand surety for his magistracy was forthwith liable as if he had become a verbal guarantor for him. 5. They also issued a rescript to the effect that if the question arises whether someone is a *municeps*, it is right for proof to be drawn from the very facts; for the mere similarity of a name was not adequate to confirm anyone's origin. 6. The Emperors Antoninus and Verus issued a rescript to the effect that it was necessary to provide surety for those who held office under compulsion as much as for those who recognized their duty of their own free will.

2

DECURIONS AND THEIR SONS

1 ULPIAN, *Opinions, book 2:* A governor will take care to recall to their native soil decurions who are proved to have left their seats in the community to which they belong and to have migrated to other places and see that they perform the appropriate *munera.*

2 ULPIAN, *Disputations, book 1:* Anyone who has been temporarily exiled, if he is a decurion, ceases to be a decurion. If he returns, he will clearly not recover his position, but is not debarred from ever becoming a decurion again. In any case, he will not be restored to his own position (for it is indeed possible for someone to be co-opted into his position), and, if the number in the *ordo* is complete, he will have to wait until another position is vacant. The position of someone who is temporarily removed from the *ordo* is different. For when the time is up, he is a decurion again. But it is also possible for someone to be co-opted into this position, and so if he finds his position filled, he will have to wait until a position is vacant. 1. A question arises, however, as to whether someone who has been restored to the *ordo* has that position [of seniority] which he had originally or that which he has just acquired, if it happens that the sequence in which votes are cast is at issue. I think, however, that he has the same position which he had originally. The same will not apply to someone who has been temporarily exiled; for he comes into the *ordo* as a newcomer. 2. The question arises in the case of sons of decurions whether the only person who is regarded as the son of a decurion is the one who was conceived and born while he was decurion or whether the one who was born before his father became decurion is also included. And, indeed, as far as his immunity to flogging or servitude in the mines is concerned, it makes no difference if he is born from a humble father, if the honor of the decurionate is later conferred on his father. Papinian replies that the same also applies if the grandfather is a decurion, in order that a son may not be marked by his father's disgrace. 3. But if his father is removed from the *ordo,* at any rate, if this happens before his conception, I think that he is considered the son of a humble father as far as officeholding is concerned. For if his father loses his rank after his conception, one must generously admit that he is to be regarded as the son of a decurion. 4. Further, also, the man who is born after his father's exile, provided that he was conceived before it, will be regarded as equal to the son of a decurion; but if he was conceived after, the exile will make a difference to him. 5. If he is born to a father temporarily removed from the *ordo* and was both conceived and born in the period in question, can he be regarded as born as it were the son of a decurion, even though his father died before he returned to the *ordo*? It must be generously admitted that he can. 6. Furthermore, if he was conceived by a humble father and in due course before his birth his father both gained and lost the status of decurion, one will respond favorably that the period in question benefits him as if he had been born. 7. No crime of the father can cause a penalty to an innocent son; and so he is not debarred from the *ordo* of decurions or other offices for any such cause. 8. Those who are older than fifty-five are debarred by *constitutiones* from being called on for the office of decurion against their will. But if they have agreed to this, they ought to hold office, even if they are over seventy, but are not forced to perform civil *munera.*

3 ULPIAN, *Duties of Proconsul, book 3:* It will always be necessary to ensure that anyone who has suffered a milder sentence by reason of his having been temporarily exiled should reckon as gain the humanity of his sentence and not recover his decurionate. 1. But if anyone is not temporarily exiled, but temporarily removed from the *ordo,* even for the crime of forgery or any other of the graver crimes, he is in a position to be able to return to the *ordo.* For the Emperor Antoninus deliberately laid down by edict that anyone, who for any reason had been temporarily debarred from the *ordo* or from serving as an advocate or from any other duty, should, nonetheless, when the time was up, be able to hold the office or perform the duty. This is right; for a sentence

which had placed a limit on the period of debarring is not to be made heavier. 2. There is no doubt that bastards can be co-opted into the *ordo*; but if one has as a competitor someone conceived legitimately, it is right for him to be preferred, as the deified brothers noted in a rescript to Lollianus Avitus, the governor of Bithynia. But if such people are lacking, bastards of honorable estate and conduct will also be admitted to the decurionate; nor will this be a disgrace to the *ordo*, since it is in its interest for the *ordo* always to be at full strength. 3. The deified Severus and Antoninus allowed those who profess the Jewish superstition to hold office, but also imposed on them only those obligations which would not damage their superstition.

4 MARCIAN, *Criminal Proceedings, book 1:* A decurion, who is debarred from hiring anything, if he found himself as lessee of something as a result of a legitimate inheritance, remains so. This principle is to be observed in all similar cases.

5 PAPINIAN, *Questions, book 2:* It was decided that anyone temporarily removed from the *ordo* for an offense which involves ignominy should be removed permanently, but that those ordered to go into exile temporarily for a less serious offense should not be ranked among the *infames* on the grounds that the matter has been dealt with.

6 PAPINIAN, *Replies, book 1:* Bastards become decurions; and this will also be possible for someone born out of incest; for no barrier must be placed in the way of the advancement of someone who has done no wrong. 1. Those under twenty-five who have been made decurions receive the *sportulae* of decurions; but for the time being they are not entitled to vote along with the rest. 2. A decurion is also debarred from contracting for the collection of the revenues of his own *civitas*. 3. Those who have abandoned the investigation of a criminal charge, unless there has been granted the concession of an amnesty, may not be graced with the rank of decurions, since those condemned in criminal proceedings are branded with ignominy under the *senatus consultum Turpillianum* as if for calumny. 4. A father who appealed when his son was made decurion, even if he is ruled out of court by the prescription of time, provided that he did not endorse what was done, will not be held liable for civil *munera* on behalf of his son. 5. If other special dispensations are irrelevant, those who are graced with the position of decurion by several nominations at the same time are to be placed first in the order of voting. But in addition, anyone who has several children is asked to vote first in his college and takes precedence over the others in the matter of rank.

7 PAUL, *Views, book 1:* Offices and *munera* are not to be bestowed as a matter of course but on everyone who is most suitable. 1. Those who are deaf or dumb, if they are completely deaf or completely dumb, are excused from civil offices, but not also from *munera*. 2. Someone who is not a decurion cannot hold the duumvirate or other offices, because plebeians are debarred from holding the office of decurions. 3. A father is deemed not to consent to the decurionate of his son if he has formally declared his wish to the contrary either in the court of the governor or in the *ordo* itself or in some other way.

8 HERMOGENIAN, *Epitome of Law, book 1:* It is possible for *alimenta* to be voted to decurions who have lost their livelihoods, especially if they have exhausted their patrimony by munificence to the *patria*.

9 PAUL, *Decrees, book 1:* Severus Augustus said: "Even if it were proved that Titius had been born while his father was a slave, still, since he was born from a freewoman, he is not debarred from becoming a decurion in his own *civitas*." 1. There is no doubt that it is not proper to make *naviculariі* decurions.

10 MODESTINUS, *Replies, book 1:* Herennius Modestinus replied that a man is not made decurion by the mere posting of the list of members, if he has not been legally elected decurion.

11 CALLISTRATUS, *Judicial Examinations, book 1:* Not only those who are of tender age but also those who are elderly are debarred from becoming decurions. The former

are temporarily excused as unable to administer public business, the latter are permanently excluded. But mature men are not debarred, lest by the release of mature men young men should be burdened by being the only ones left to undertake all public *munera*. For those who are younger than twenty-five may not be made decurions except for some special reason, nor may those who have passed fifty-five. Sometimes also account will need to be taken of long established custom in these matters. In fact, our emperors, when consulted about including men of this age in the *ordo* at Nicomedia, issued a rescript that custom was to be followed.

12 CALLISTRATUS, *Judicial Examinations, book 6:* It is not proper to ignore as base persons those who deal in and sell objects of daily use, even though they are people who may be flogged by the aediles. Indeed, men of this kind are not debarred from seeking the decurionate or some other office in their own *patria*; for they do not suffer from *infamia*. Nor indeed are those who have actually been flogged by the aediles excluded from office, even if the aediles were within their rights in performing that act. Nonetheless, I think it is dishonorable for people of this kind who have been subjected to flogging to be admitted to the *ordo*, and especially in those *civitates* which have plenty of men of standing. For if there is a shortage of those who are bound to perform public *munera*, it follows that even these may hold local office, if they possess sufficient substance.

13 PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus, Augusti, issued a rescript to the effect that those who had been temporarily exiled and had returned would not be admitted into the *ordo* without the permission of the emperor. 1. They also issued a rescript to the effect that those who had been exiled would not be admitted to the *ordo* of decurions when the time was up unless they were of such an age that they were not yet eligible to be elected decurions and their rank, by reason of the expectation of office which it carried, made it possible for the emperor to grant the favor. 2. They also issued a rescript to the effect that someone who was born in exile was not debarred from holding the office of decurion. 3. They also issued a rescript to the effect that if someone wished to state that a man had not been properly elected decurion, his plea was not acceptable, since he should have stated this at the outset.

14 PAUL, *Questions, book 1:* The deified Pius issued a rescript to the effect that a decurion who had been condemned should not be tortured. Whence it follows also that even if he has ceased to be a decurion and is then condemned, he may still not be tortured out of respect for his former rank.

3

COMPILING THE LIST OF MEMBERS

1 ULPIAN, *Duties of Proconsul, book 3:* Decurions must be recorded in the list, as the municipal charter prescribes; but if the charter does not cover a case, then rank will need to be considered, so that they are recorded in the same order as that in which they each held the highest office of the municipality: thus, first those who have held the duumvirate if this office is the highest, and among them the most senior first; then, those who have held the office which follows next after the duumvirate in the community; then, those who have held the third highest office and so on; finally, those who have held no office, in the order in which each of them entered the *ordo*. 1. The same order is also to be observed in casting votes as we have prescribed for the compilation of the list.

2 ULPIAN, *Opinions, book 2:* In the list of decurions in a municipality, the names of those who have achieved [imperial] office on the recommendation of the emperor must be recorded first and then the names of those who have simply held municipal office.

4

MUNERA AND OFFICES

1 HERMOGENIAN, *Epitomes, book 1:* Among civil *munera*, some attach to a *patrimonium*, others to persons. 1. Patrimonial *munera* are those relating to the land transport system and to the office of *navicularius*; the office of *decemprimi*, for these men collect the regular taxes at their own risk. 2. Personal civil *munera* are the defense of one's community, that is, the appointment as advocate; an embassy to receive census assessments or acquire a *patrimonium*; *scribatus*; camel-management; the supervision of the corn supply and similar matters; the supervision of public land; the supervision of corn purchases; the supervision of the water supply; the provision of race horses for the games; the upkeep of a public road, corn funds, heating for baths; the distribution of the corn supply and some other duties similar to these. For other duties also can be grasped under the laws of each community by analogy with those which we have listed, because of established custom. 3. In general, something is to be regarded as a personal *munus* if it regularly arises from bodily activity together with the conscientious exercise of the mental faculties; as a patrimonial *munus* if it particularly involves expense. 4. Equally, tutelage is a personal *munus*, the care of a grown-up or of a madman, likewise of a spendthrift, a dumb person or of an unborn child, even to the extent of providing food, drink, shelter, and so on. But in addition, there is a curator provided for the goods of someone who is away, by whose activity usucapion is prevented and who sees that debtors are not released; similarly, if possession of goods is sought under the Carbonian Edict and satisfaction is not given, a curator provided for the management of the goods undertakes a personal *munus*. Similar to these men are those who are provided as curators for the goods formerly belonging to someone who has been captured by the enemy and whose return is hoped for; likewise, curators provided for the management of the goods left by someone to whom no one has yet succeeded either under civil or under statute law.

2 ULPIAN, *Sabinus, book 21:* As far as office is concerned, a man is regarded as having his son in his power even if he is in the power of his father.

3 ULPIAN, *Opinions, book 2:* Even those who originate from the city of Rome, if they take up domicile in another place, are obliged to undertake its *munera*. 1. No municipal *munus* can be imposed on those who are concerned with building camps in the course of military activity. But other private persons, even if they are the relatives of soldiers, are obliged to obey the laws of their *patria* and *provincia*. 2. If someone condemned to the mines is granted *restitutio in integrum*, he may be summoned to undertake *munera* or hold office, as if he had never been condemned. Nor will he regard his misfortune and sad mischance as militating against his being regarded as a suitable citizen of his *patria*. 3. Their very sex prevents women from undertaking *munera* involving bodily activity. 4. A father, whose son is in his power, does not have the right of blocking his son from holding office and undertaking *munera*, if he has no grounds for exemption. 5. The fact that a father did not agree to the offices or *munera* of his son, in order that his *patrimonium* might not bear the burden, provides a defense, but does not remove a citizen from the service of his *patria* to the extent of his capacity. 6. Even if one is over seventy-five or the father of five living sons and is therefore exempt from civil *munera*, nonetheless, his sons are obliged to assume the relevant *munera* on his behalf; for the appropriate reward of immunity is thus given to fathers on account of their sons because they themselves will undertake the *munera*. 7. A step-father is not obliged to undertake the burdens of civil *munera* on behalf of his step-son by any legal rule. 8. Freedmen are obliged to undertake *munera*

in the place of origin of their patrons, but only if they have *patrimonia* which will be subject to the burdens; for the property of patrons is not subject to the *munera* of freedmen. 9. The fact that a father is on trial for some offense is not to be treated as a barrier to the sons holding office. 10. Even those who are under twenty-five were long ago allowed to be *decaprotoi* (*decemprimi*), though not while in the army, since this seems to be more a patrimonial burden. 11. It is agreed that the collection of taxes is a patrimonial burden. 12. The supervision of corn purchases is a *munus*, and the age of seventy or the possession of five living sons confers exemption. 13. Those on whom the burden falls of providing accommodation for those soldiers who are entitled to receive it when they come to the community are all to undertake it in turn. 14. The *munus* of accommodating someone in one's house is a patrimonial and not a personal burden. 15. The governor of a province is to see that *munera* and offices are fairly distributed in turn in the cities, according to age and rank, following the levels of *munera* and offices originally established, in order that the cities may not be left in the lurch if the same men and the same estates are frequently and unsystematically burdened. 16. If there are two sons in the power of their father, he is not compelled to undertake their *munera* at the same time. 17. If someone who left two sons did not in his last dispositions arrange to provide for the *munera* of the one son out of their shared patrimony, the one on whom *munera* and offices are imposed is obliged to undertake them at his own expense, even though the father, if alive, would have provided for burdens of that kind on his behalf.

4 ULPIAN, *Opinions, book 3:* The supervision of the building or repair of a public building in a community is a public *munus* from which the father of five living sons is exempt; nor will he lose the exemption which he has from other *munera* if this *munus* was imposed by force. 1. A temporary, not a permanent, exemption is conferred on those who lack the resources for the *munera* or offices which are imposed; for if a *patrimonium* is increased by honorable means according to desire, an estimate will be made at the appropriate time whether someone is suitable for the function to which he has been appointed. 2. The poor do not undertake patrimonial burdens because of the actual constraint of destitution, but they perform the services which are prescribed for their bodies. 3. Someone who was bound to perform the *munera* of his community put his name down for the army in order to avoid this municipal burden; but he was unable to weaken the claim of his community.

5 SCAEVOLA, *Rules, book 1: Naviculariі* and traders in olive oil, who have tied up a large part of their patrimony in the business, have an exemption from any public *munus* for five years.

6 ULPIAN, *Duties of Proconsul, book 4:* The following declaration is made in a rescript of the deified brothers to Rutilius Lupus: "The *constitutio* in which it is laid down that men should also hold magistracies in the same order as that in which they are made decurions is always to be observed whenever it happens that all the men involved are suitable and satisfactorily endowed. But if some of them are so poor and destitute that they are not only not up to public office, but can scarcely even live off their own property, it is not expedient and quite dishonorable for a magistracy to be entrusted to such men, especially if there are men who can hold it without damage to their own fortune or to the reputation of the community. So those who are better off must realize that they may not use this legal pretext and that investigation is only to be made of the date at which each man was adlected into the *curia* as between those who because of their wealth are entitled to the dignity of office." 1. It is certain that public debtors cannot be invited to hold office, unless they have earlier provided security to the community for what is owed. But we ought, however, to regard those as public debtors who are left in this position as a result of their administration of the community. But if they are not debtors as a result of the administration of the community, but have borrowed money from the community, they are not in the position of needing to be debarred from office. It is clearly adequate as an alternative to payment,

if someone provides suitable pledges or verbal guarantors; and this was the purport of a rescript of the deified brothers to Aufidius Herennianus. But if they owe money as a result of a unilateral promise, even if this unilateral promise cannot be refused, they are in the position of needing to be debarred from office. 2. If someone does not have an accuser, he is not to be debarred from office, any more than someone whose accuser has abandoned the case. For this was the purport of a rescript of our emperor with his deified father. 3. One must realize that some *munera* are personal or patrimonial, likewise some offices. 4. *Munera*, which are imposed on *patrimonia*, or levies are such that neither age nor the number of children nor any other prerogative, which regularly relieves someone of personal *munera*, is any excuse. 5. But in fact the *munera*, which are imposed on *patrimonia*, are of two kinds; for some are imposed on owners of property, whether they are *municipes* or not, some only on *municipes* or *incolae*. Levies, which relate to land or buildings, are imposed on their owners; but *munera*, which are held to be patrimonial, are only imposed on *municipes* or *incolae*.

7 MARCIAN, *Criminal Proceedings, book 2:* A defendant is debarred by imperial *constitutiones* from seeking office even before sentence; nor does it make any difference, whether he is a plebeian or a decurion. But he is not debarred from seeking office once a year has passed from his becoming a defendant, unless it was his fault that the case was not heard within a year. 1. The deified Severus issued a rescript to the effect that a man against whom an appeal has been lodged over the holding of office is to be subject to *coercitio* if he usurped the office while the appeal was pending. So also if someone who has been debarred by a sentence from holding office has appealed, he must in the meanwhile abstain from seeking office.

8 ULPIAN, *Edict, book 11:* It is not proper for *minores* before their twenty-fifth year to be admitted to the administration of the community or to *munera* other than patrimonial or to office. Indeed, they are not appointed as decurions or if appointed do not vote in the *curia*. But the twenty-fifth year once begun is regarded as completed [for this purpose]; for it has been laid down as a favor as far as office is concerned that we should accept years as completed once begun, but only for those offices in which no property of the community is entrusted to them. Indeed, one must not admit that office can be entrusted to someone if it involves public loss as well as the ruin of the *minor* himself.

9 ULPIAN, *Duties of Consul, book 3:* If anyone who has been appointed a magistrate in a municipality declines to perform the *munus* imposed on him, he is to be forced by the governors to accept the burden, by the same means by which tutors are regularly forced to accept the burden imposed.

10 MODESTINUS, *Distinctions, book 5:* A *munus* cannot be imposed on someone who is holding office; office cannot be entrusted to someone who is undertaking a *munus*.

11 MODESTINUS, *Encyclopaedia, book 11:* It is laid down by edict that offices should be conferred in due order and, in a letter of the deified Pius to Titianus, that one should move from the lesser to the greater. 1. This is true even if it is prescribed in the *lex municipalis* that men of a certain status should be preferred for offices; it must, however, be realized that this provision is to be observed if the men are suitable; and this is what is contained in a rescript of the deified Marcus. 2. Whenever there is a shortage of men who undertake office, immunity is in some respect breached, as is laid down in a rescript of the deified brothers. 3. The deified Magnus Antoninus issued a rescript with his father to the effect that a doctor can be rejected by a community, even if he has originally been approved. 4. The deified Magnus Antoninus issued a rescript to the effect that those who teach children to begin to read do not have exemption.

12 JAVOLENUS, *From Cassius, book 6:* Someone who is granted exemption from a public *munus* is not granted the right not to become a magistrate, because that is more honorific than burdensome. Everything else, which is occasionally demanded specially, like road building, is not to be demanded from such a person.

13 JAVOLENUS, *From Cassius, book 15:* Exemption and likewise immunity, which are given to the children and descendants of someone, relate to them as long as they are of that family.

14 CALLISTRATUS, *Judicial Examinations, book 1:* Municipal office is the administration of the community with an official position, whether it involves expense or not. 1. A *munus* is either public or private. Something is called a public *munus* if we undertake it in the course of administering the community and are involved in expense but have no formal

position. 2. Road-building and levies on properties are *munera* not of a person, but of places. 3. If one is concerned with the holding of office or the undertaking of *munera*, in the first place one must consider the character of the man on whom this office or administration of the *munus* is conferred; likewise, his place of birth; also his property, whether it is sufficient for the *munus* in question; likewise, the law under which everyone must perform *munera*. 4. Plebeian sons-in-power will be bound at the risk of the man who nominated them, as our Emperor Severus Augustus laid down in a rescript of these words: "If your son is among the plebeians, although you ought not to be forced against your will to undertake office on behalf of your son, nonetheless, you cannot rely on parental power to prevent him serving his *patria* at the risk of the man who nominated him." 5. The possibility of holding office is not unregulated, but there is a fixed order for this. For a man may not hold the more important magistracy before he has held the less important one, nor at any age, nor may anyone hold offices in succession. 6. It is laid down in several *constitutiones* that if there is no one else to hold office, those who have held it are to be forced to do so again. The deified Hadrian issued a rescript about the repetition of *munera* in these words: "I agree to this, namely that if there are no others suitable to perform this *munus*, men should be appointed from among those who have already performed it."

15 PAPINIAN, *Replies, book 5:* Even if a father wished his son to be decurion, nonetheless, when the father has died, the appropriate offices which after his death have fallen to the son who is decurion do not relate to the burden of the son who is joint heir, even if his father left him property sufficient for him to be decurion.

16 PAUL, *Views, book 1:* Those who offer an equivalent of money for an office or a *munus* instead of accepting it are not to be heard. 1. Anyone who has promised money in return for office, if he has begun to pay it, is to be forced to provide the whole, by analogy with someone who has begun a piece of work. 2. A son is not forced against his will to provide surety on behalf of his father that the property of the community will not suffer. 3. No one is forced to undertake the defense of his community more than once, unless necessity demands that that should happen.

17 HERMOGENIAN, *Epitome of Law, book 1:* No one is debarred from holding again of his own free will the priesthood of a province. 1. If someone who is exempt from offices and civil *munera* agrees to the appointment of his son, who is in his power, as decurion, he is compelled to help with his expenses in his *munera* and offices.

18 ARCADIUS CHARISIUS, *Civil Munera, sole book:* There is a triple division of civil *munera*; for some are personal, some are called patrimonial, some are mixed. 1. The personal ones are those which are carried out by mental application and by the deployment of bodily effort without any loss to the man undertaking them, like tutelage or care, also the care of the account book. 2. And the quaestorship in some communities is not regarded as an office, but is a personal *munus*. 3. The production of recruits or of horses or of any other animals which have to be produced, or the conveyance or accompaniment of goods, such as money belonging to the imperial treasury, or the provision of care or clothing, any of these is a personal *munus*. 4. The care of the public transport system, likewise the provision of *angariae*, is a personal *munus*. 5. Also, the supervision of the purchase of corn or oil (for supervisors of these goods, who are called *sitonai* and *elaionai* are regularly appointed) fall among the personal *munera* in some communities; and also the heating of the public bath, if the money is given to a supervisor out of the revenues of a community. 6. And further, the supervision of an aqueduct is included among personal *munera*. 7. Also the office of the irenarchs, who are in charge of public order and the regulation of behavior; and further, the office of those who are regularly chosen to build roads, provided that they contribute nothing from their own patrimony toward the *munus*; and *episcopi*, who look after bread and other goods for sale, which serve the daily needs of the people of the various communities, perform personal *munera*. 8. Those who organize or collect or provide the corn supply and those who raise money by the poll-tax support the worry of a personal

munus. 9. And further, the curators who are regularly chosen to collect the public revenues of the various communities are subjected to a personal *munus*. 10. These also are bound to personal *munera*, those who are appointed as custodians of temples or *archeotae* or *logographi* or archivists or *xenoparochi* (as in some communities) or limenarchs or supervisors for the erection or repair of public buildings, whether palaces or shipyards or way stations, provided that they expend public money on the fabric of the building, also those who are placed in charge of building or repairing ships, where custom demands. 11. Likewise, *camelasia* also is a personal *munus*; for if one takes account of food and of the camels, a fixed sum has to be given to the camel-drivers, so that those in charge are bound only to serve with their persons. It has been specially laid down that these men are to be called in the order of the list and are not to be let off on any ground, except that of poor and run-down health or bodily infirmity. 12. Ambassadors also, who are dispatched to the shrine of the emperor, because they are sometimes accustomed to receive travel money, known as *legativum*, along with night watchmen and supervisors of bakeries, undertake a personal *munus*. 13. Likewise, official representatives, whom the Greeks call *syndici*, and those who are chosen to conduct or defend a particular case are involved in the labor of a personal *munus*. 14. The obligation of serving as a judge is also treated as a personal *munus*. 15. If anyone has been chosen to oblige those, who own property near a public road, to pave the road, this is a personal *munus*. 16. Likewise, those who are appointed to receive or register census professions turn their minds to the worry of a personal *munus*. 17. Whip-bearers also who accompany the supervisors of games during the competitions and the scribes of magistrates are tied to a personal *munus*. 18. Patrimonial *munera* are those which are carried out at the expense of the patrimony and at a loss for the person undertaking them. 19. The provision of oil and the organization of the exchange of [worn] coin are regarded as patrimonial *munera* at Alexandria. 20. The receivers of wine for the province of Africa also carry out a patrimonial *munus*. 21. There are, however, two kinds of patrimonial *munera*; for some of these *munera* are imposed on properties or patrimonies, such as the provision of war horses or of mules and of *angariae* and post-horses. 22. So even those who are neither *municipes* nor *incolae* are forced to accept obligations of this kind. 23. And a rescript has been issued to the effect that usurers, even if they are veterans, must accept impositions of that kind. 24. From *munera* of this kind neither a *primipilaris* nor a veteran nor a soldier nor anyone else, who relies on some dispensation, nor a priest is excused. 25. Furthermore, some communities have the right to demand that those who hold properties in their territory provide each year a certain quantity of corn according to the extent of their land; this kind of contribution is a *munus* of a property. 26. The *munera* of *decaprotia* and *icosaprotia* are mixed, as Herennius Modestinus both in treatise and argument well laid down and by the best possible reasoning. For *decaproti* and *icosaproti* in collecting taxes both perform a personal service and make good the losses to the imperial treasury on behalf of all the defaulters, so that it is correct for this *munus* to be regarded as being a mixed one. 27. But those *munera* which we declared above to be personal will fall under the heading of mixed *munera*, if those who perform them also have outgoings from their own resources according to the law of their community or by custom or in collecting the corn supply make good the shortfalls resulting from abandoned properties. 28. All these *munera*, which we have divided into three, share one common characteristic; for personal and patrimonial and mixed *munera* are described as civil or public. 29. Whether, however, exemption is granted to anyone only from personal *munera* or also from civil *munera*, they cannot be excused from the provision of corn or of *angariae* or of post-horses or from billeting or from the provision of a ship or from the collection of the poll-tax, except for soldiers and vet-

erans. 30. Both the deified Vespasian and the deified Hadrian issued rescripts to the effect that teachers who are released from civil *munera* and grammarians and orators and doctors and philosophers had been granted immunity from billeting by the emperors.

5

RELEASE AND EXEMPTION FROM *MUNERA*

1 ULPIAN, *Opinions, book 2:* Every dispensation rests on its own equity. But if credit is given to those who make some claim, without anyone judging the issues, or permission is given at random to everyone to excuse themselves as they please without prescription of time, there will be no one to undertake necessary *munera* in the various communities. So even those who claim for themselves dispensation from civil *munera* on the grounds of possessing living sons must lodge an appeal and those who have not observed the prescribed times in carrying out the process of an appeal of that kind are rightly debarred under this rule. 1. Those who enjoy some dispensation must appeal every time they are appointed, even if they have already been let off. But if the same adversary is shown to be repeatedly appointing someone to bring him into ill repute, in order to trouble a man whom he knows to rest his case on a permanent exemption, he is to be ordered to pay the costs of the case, in line with the decrees of the emperors, to the man whom he has repeatedly troubled without cause. 2. Those who in order to deprive the *ordo* of its due in holding of office, when they were reckoned among those in the community who could be appointed to the highest offices, to avoid greater burdens have transferred themselves to the status of tenants of properties, in order to be subject to lesser burdens, have failed to achieve this dispensation for themselves. 3. Although someone is sixty-five years old and has three living sons, nonetheless, he is not as a result freed from civil *munera.*

2 ULPIAN, *Opinions, book 3:* It is not right for someone in his sixteenth year to be called upon for the *munus* of *sitonia.* But if there is no specific provision in the community about appointing even those under twenty-five to *munera* or offices, the proper age qualification is to be observed. 1. The number of children or the age of seventy does not provide dispensation from office or the *munera* attaching thereto, but only from civil *munera.* 2. Adoptive sons do not count toward the number of those sons, who regularly provide a dispensation for their parents. 3. Those who are called upon to perform *munera* must prove that they have the proper number of living children at the time when they wish to be excused on their account; for if the number of children is achieved later, this does not free a man from *munera* already undertaken. 4. Patrimonial burdens attract no dispensation because of the number of children. 5. Free children, even if they have ceased to be in the power of their father, provide a dispensation from civil *munera.* 6. Someone who is partially deaf does not have immunity from civil *munera.* 7. If the governor realizes that someone is so weighed down by old age and bodily infirmity that he cannot discharge the *munus* of transporting money, he should release him and appoint a replacement. 7a. Bodily infirmity provides an excuse from those *munera* which are discharged merely by bodily activity. But those which can be carried out by the mental application of a sensible man or with the patrimony of a man who is sufficiently well endowed for this purpose are not remitted except for clear and agreed demonstrable reasons. 8. Those who teach children to begin to read and write do not have immunity from civil *munera.* But it is the duty of the governor to see that nothing which is beyond their strength is assigned to any of them whether they are masters in the communities themselves or in the villages.

3 SCAEVOLA, *Rules, book 3:* Exemption from any public *munus* is granted by reason of their ship to anyone who has built a sea-going ship and provided it for the transport of the corn supply of the Roman people, provided it is of not less than fifty thousand

modii capacity, or five or more of not less than ten thousand modii capacity, as long as the ship is in use or another in its place. Senators, however, cannot enjoy this exemption since they cannot ever own a ship under the *lex Julia* on extortion.

4 NERATIUS, *Parchments, book 1:* The duration of an exemption which is granted to those who are away on public business is not to be reckoned as ending on the very day on which someone has returned, but is to allow for some recovery from the journey. For a man is just as much to be regarded as absent on public business if he is on his way to deal with it or on the way back. If, however, someone takes up more than a reasonable time either by delaying on the journey or somewhere else, the exemption is to be so treated as to ensure that the day on which he would conveniently have completed his journey is to count as the first one falling after his period of exemption.

5 MACER, *Duties of Governor, book 2:* Ulpian replied that no exemption from any other office is conferred by the decurionate, although this also is an office.

6 PAPINIAN, *Questions, book 2:* Those who are exempt from public *munera* are not normally forced to undertake those which are demanded in addition to the normal ones.

7 PAPINIAN, *Questions, book 36:* Veterans are released forever from those *munera* which are not imposed on patrimonies, according to the letter of our excellent Severus Augustus.

8 PAPINIAN, *Replies, book 1:* In the conferring of office, neither a man over seventy nor the father of five children is excused. But in Asia those who rely on five children are not forced to undertake the priesthood of the province. This is what our excellent and most great Severus Augustus decreed and later laid down as something to be observed in the other provinces. 1. It was decided that the only contractors for the collection of taxes for the imperial treasury who were released from civil *munera* and tutelage were those who were carrying out their business in person. 2. The privileges involved in exemptions do not relate to the sons of veterans. 3. Someone who possesses exemption from a public *munus* is right to refuse levies imposed without warning by the magistrates; but he must not refuse those which arise under the laws of the community. 4. It was decided that philosophers, who show themselves to be available and useful for those who are seeking to follow that course of study, are exempted from tutelages and likewise from demeaning personal *munera*, but not from those which involve expenditure; for true philosophers despise money and by a desire to retain it reveal that their profession is feigned. 5. If someone has appealed to the most great emperors and set off to Rome to plead his own case, until the hearing is finished, he is released from holding office and performing civil *munera* in his own community.

9 PAUL, *Replies, book 1:* Those who make their claim in Rome are to be excused from *munera* in their own *patria* just as if they had made their claims there. Paul replied that the dispensation granted to those engaged in the corn trade related also to release from holding office.

10 PAUL, *Views, book 1:* No dispensations provide exemption from those burdens which are imposed on property or patrimony. 1. The body of those who measure out the corn in connection with the corn supply of the city has exemption but not in the provinces. 2. The provision of *angarii* and the obligation of accepting billeting are remitted among other things to a soldier and to professors of the liberal arts. 3. People are not excused by pleading poverty if their resources increased in the course of time after the appeal. 4. Advocates of a community are exempt from offices and *munera* at the same time.

11 HERMOGENIAN, *Epitome of Law, book 1:* There are *munera*, which belong specifically with something, from which neither children nor age nor military service nor any other dispensation legally brings release; for instance, on properties falls a levy for making up a road or the provision of *angarii*, the *munus* of billeting (for no one has release from this except for those to whom it has been granted by gift of the emperor) and any other things of this kind in addition.

12 PAUL, *Views, book 1:* Advocacy in the same affair cannot be mandated again to an ambassador who has looked after public business within the prescribed period of exemption. 1. The entourage of governors and proconsuls or procurators of Caesar are exempt from *munera*, offices, and tutelages.

13 ULPIAN, *Edict, book 23:* The praetor undertakes that he will release those whom he knows cannot give their attention to acting as judge; perhaps because someone is permanently unable to give his attention, because he has come to a state of health such that it is clear that he cannot undertake civil duties; or if he suffers from another disease, so that he cannot keep control of his own affairs; or if people have obtained a priesthood of a kind which they cannot abandon without offending what is hallowed. For those also are permanently released. 1. There are two kinds of exemptions of public *munus* which may be given: one full, when it includes exemption from military service; one partial, when people have received simple exemption from a *munus*. 2. Someone who has not been released is forced to act as judge, even against his will. 3. If a judge begins to claim release after the case has been heard, if he wants to claim release on the grounds of a dispensation which he had before he took up the office of judge, he is not to be heard. For he renounces his claim to release by taking on the office of judge. But if later a just reason emerges for a judge to be released perhaps temporarily, he must not be transferred to another court, if that will take place at someone else's disadvantage. In the long run, it is preferable to wait for a while for a judge who has already heard a case rather than to instruct the affair to a new judge to be judged again.

14 MODESTINUS, *Rules, book 7:* A dead son does not help toward release from *munera*, except for one lost in war. 1. The same person will not hold the supervision of two pieces of work at the same time.

6

THE RIGHT OF IMMUNITY

1 ULPIAN, *Opinions, book 3:* Those who are in ships solely in order to work on them for the sake of business do not have immunity from civil *munera* by any *constitutio*. 1. Immunities granted to individuals are not transmitted to heirs. 2. And even those which are granted to and preserved by a family and its descendants do not belong to those who are descended in the female line.

2 ULPIAN, *Duties of Proconsul, book 4:* Faith must be kept with those who have bound themselves to accept *munera* or offices on a certain condition since they could not otherwise be bound against their will to undertake the office in question, and the condition must be observed under which they agreed to attach themselves to the *munera* or offices.

3 (2, 1) ULPIAN, *Duties of Proconsul, book 4:* It is declared by a rescript to Venidius Rufus, the legate of Cilicia, that immature men, although the constraint of shortage of men may cause pressure, are not to be admitted to officeholding.

4 (3) ULPIAN, *Duties of Proconsul, book 5:* Those who are over seventy are exempt from tutelages and personal *munera*. But someone who has begun, but not ended his seventieth year does not enjoy this exemption, since someone in his seventieth year does not seem to be over seventy.

5 (4) MODESTINUS, *Rules, book 6:* Immunities granted generally with the proviso that they would be transmitted to descendants last forever for successive generations.

6 (5) CALLISTRATUS, *Judicial Examinations, book 1:* Old age has always been revered in our state; for our ancestors accorded almost the same honor to the old as to magistrates. In regard also to the liability to municipal *munera*, the same honor is accorded to old age. But it can be said that a man who has become rich in old age without having previously undertaken any public *munus* is not exempted from this

burden by the dispensation of age, especially if the administration of the *munus* imposed involves not so much physical disturbance as expenditure of money, and if he belongs to a community in which men rich enough to perform public *munera* are not easily found. 1. It is also right to consider the law of each place to see whether in listing any immunities by name it mentions age limitations. This can also be inferred from the letter of the deified Pius which he sent to Ennius Proculus, proconsul of the province of Africa. 2. It is made clear in various ways and at length by the rescripts of the deified Helvius Pertinax that the number of children serves for release from municipal *munera*. For he addressed a rescript to Silvius Candidus in these words: "Even if the number of children does not release their fathers from every *munus*, nonetheless, since you have shown in your petition that you have sixteen children, it is not unreasonable to permit you to devote yourself to bringing up your children and to relieve you of *munera*." 3. Men of business who assist the corn supply of the city, likewise, shipowners who serve the corn supply of the city, obtain immunity from public *munera*, so long as they are engaged in this activity. For it has rightly been decided that they should be compensated for the risks they run, and indeed encouraged by rewards to run them, so that men who undertake public *munera* abroad, involving risk and effort, may be freed from disturbance and expense at home; indeed, it is not inappropriate to say that they too are absent on public business while they serve the corn supply of the city. 4. A fixed provision is laid down for the immunity which is granted to shipowners; they alone possess this immunity; it is not also granted to their children or freedmen; and this is laid down in imperial *constitutiones*. 5. The deified Hadrian stated in a rescript that only those who serve the corn supply of the city have immunity for sea-going ships. 6. Although a man may be a member of the corporation of shipowners, yet if he does not possess a ship or ships and if all the things laid down in imperial *constitutiones* do not fit his case, he will not be able to avail himself of the dispensation granted to shipowners. And this was laid down by the deified brothers in a rescript in these words: "There were also other people who claimed to escape *munera* on the same grounds as shipowners and people supplying the market of the Roman people with corn and oil, who are immune, although they were not making voyages and did not have the greater part of their capital invested in maritime and mercantile business; such people are to be deprived of immunity." 7. In regard to dispensations it must be stated that if any one is called to undertake municipal *munera* before he begins in business, or before he enters a *collegium* which confers immunity, or before he reaches the age of seventy or before he publicly registers [his immunity] or before he has children whom he acknowledges, he should be compelled to hold the office. 8. Business activity is necessarily designed to increase a man's wealth. All the same, if a man applies the greater part of his money to business activity and yet after becoming rich has continued to employ no greater amount of money therein, he will be liable to *munera*, just like rich men who invest a modest sum in the purchase of ships and try to escape from public *munera*; and a letter of the deified Hadrian was written to the effect that this rule was to be followed. 9. The deified Pius also stated in a rescript that whenever any shipowner was being investigated it should be elicited whether he was putting on the show of being a shipowner for the purpose of escaping from *munera*. 10. Contractors who have leased the right to collect revenues of the imperial treasury are not bound by the necessity of undertaking municipal *munera*; and this rule was stated in a rescript of the deified brothers. It can be understood from this imperial rescript that the grant to contractors of exclusion from municipal *munera* was not made as an honor, but in order to prevent the diminution of their resources, which are pledged to the imperial treasury. Hence, the point can arise, whether a governor or procurator of Caesar should prevent them from actually volunteering to perform municipal *munera*; it is the better view that he should stop this, unless they are said to have balanced their accounts with the imperial treasury. 11. The *coloni* of Caesar are also freed from *munera*, so that they may be more suitable for the cultivation of the estates of the imperial treasury. 12. Immunity is granted to certain *collegia* or corporations to which the right of meeting has been given by law, namely to

those *collegia* or corporations in which each member is enrolled on the basis of his craft such as the corporation of builders and any other which has the same reason for existence, that is to say, those instituted to provide services required for public needs. Nor is immunity given indiscriminately to every one enrolled in these *collegia*, but only to craftsmen. Nor can men of any age be adlected, as the deified Pius decided, in excluding men of advanced or very tender years. But it has been established in many ways that those who have increased their resources and are capable of supporting the *munera* of the communities can no more avail themselves of dispensations which were granted to poorer men who are divided among *collegia*. 13. I understand that those who have been adlected into corporations, which provide immunity, as that of shipowners, are to be compelled to support public *munera*, if they have accepted the office of the decurionate; and this view seems to have been confirmed by a rescript of the deified Pertinax.

7 (6) TARRUNTENUS PATERNUS, *Military Matters, book 1:* Their status grants some exemption from the more burdensome *munera* to some people, for instance, those who measure out [the corn], the assistants in a hospital, doctors, makers of satchels, and craftsmen who dig ditches, veterinary surgeons, architects, helmsmen, shipwrights, artillery manufacturers, mirrormakers, builders, archers, bronze-workers, makers of statues of bronze cows, wagonmakers, shinglers, gladiators, conduit-inspectors, conduitmakers, trumpetmakers, bowmakers, leadworkers, ironworkers, stonemasons, those who burn lime, those who cut wood, those who cut and prepare charcoal. In the same category are customarily placed butchers, hunters, *victimarii*, the assistants of a factory, those who serve the sick, also copyists who can teach and the secretaries of granaries, of depositories, and of controllers of estates without owners, also helpers of adjutants, grooms, undertakers, guards for armories, also a herald and a trumpeter. So all those are regarded as being immune.

7

EMBASSIES

1 ULPIAN, *Massurius Sabinus, book 8:* If a municipal ambassador abandons an embassy he will suffer a special penalty, as well as having been removed from the *ordo*, as usually happens.

2 ULPIAN, *Opinions, book 2:* An ambassador can ask the emperor for something through an intermediary against the interests of the community of which he is the ambassador. 1. A man must establish before the *ordo* of his *patria* whether he abandoned an embassy or suffered an unavoidable delay. 2. The failure of one ambassador does not incriminate a man who has performed the *munus* as he should.

3 (3) ULPIAN, *Opinions, book 2:* Appropriate expenses are to be repaid to those who have undertaken an embassy other than at their own expense.

4 (3) AFRICANUS, *Questions, book 3:* If the question arises whether an action should be granted against someone who is on an embassy, what is important is not so much where someone either made a loan or stipulated payment, but rather whether the procedure included a provision that payment should be made during an embassy.

5 (4) MARCIAN, *Institutions, book 12:* One must realize that a debtor cannot undertake an embassy for his community; and this is a purport of a rescript of the deified Pius to Claudius Saturninus and Faustinus. 1. But the deified Severus and Antoninus also issued a rescript to the effect that those who do not possess the right of postulating cannot undertake an embassy and that therefore an ex-gladiator sent as an ambassador was not correctly sent. 2. However, debtors to the imperial treasury are not barred from serving on embassies. 3. If someone be charged in a public prosecution, there is no obligation on the accuser to take on an embassy to one who declares himself a friend or relative of the person charged; and so said the deified brothers in a rescript to Aemilius Rufus. 4. Legates can give as substitutes no other than their own sons. 5. Everyone serves on an embassy in order [of rank]; and a man is not compellable to serve on an embassy unless those chosen above him in the *curia* have served. But if the embassy requires [other] more elevated persons and those sum-

moned be of a lower status, the order of rank has not to be observed; so ruled the deified Hadrian in a rescript to the Clazomenii. 6. An edict of the deified Vespasian, directed to all cities, ordained that no more than three be sent on an embassy.

6 (5) SCAEVOLA, *Rules, book 1:* A person sent on an embassy benefits by the time from when he was selected as such, not that of his arrival at Rome. 1. Should it be the case that there is disagreement whether or not he be a member of the embassy, the praetor at Rome will take cognizance of the issue.

7 (6) ULPIAN, *Duties of Proconsul, book 4:* That a son should be granted no exemption by reason of his father's service on an embassy was laid down by our emperor and his father in a rescript to Claudius Collatus, the words of which follow: "What you seek, that by reason of your father's being on an embassy, you should be exempt from similar service, is lawfully observed in the intervals between magistracies which involve expense. The case is different with embassies which are merely a matter of service."

8 (7) PAPINIAN, *Replies, book 1:* If a son who is a decurion has undertaken to serve on an embassy instead of his father, that fact does not release him from setting out as an ambassador when his turn comes; the father, however, can claim an exemption for two years, because he is regarded as having undertaken an embassy in the person of his son.

9 (8) PAUL, *Replies, book 1:* One replies to someone who has undertaken an embassy that it is not right for him to be forced to defend the public interest again within the time prescribed for exemption, even if the suit involves the same issue. 1. "The Emperors Antoninus and Severus Augusti to Germanus Silvanus. An exemption for two years is granted to those who have undertaken an embassy; nor does it make any difference whether the embassy has been sent to us in the city or in a province." 2. One replies that someone who is serving on an embassy must not involve himself in his own or anyone else's affairs; this provision does not seem also to cover someone who gives counsel to the praetor as a friend without fee.

10 (9) PAUL, *Replies, book 3:* Paul replies concerning the loss which an ambassador suffered during an embassy that he can even sue during the term of the embassy.

11 (10) PAUL, *Views, book 1:* An ambassador cannot do anything in relation to his own property before he has undertaken the actual embassy, except for things which relate to his injury or loss. 1. If someone dies during the *munus* of an embassy, before he returns to his *patria,* the expense allowance granted when he set out is not returnable.

12 (11) PAUL, *Law of Petitions, sole book:* If an embassy is imposed on someone in absence and he undertakes it at his own expense, he can also transact the business of the embassy by means of someone else. 1. Although someone who is undertaking an actual embassy cannot deal with his own business, nonetheless, Antoninus Magnus allowed him in the name of a female ward to mount or defend a case, even though he has not given up the embassy which he undertook, particularly if he said that he was made part of it in absence.

13 (12) SCAEVOLA, *Digest, book 1:* Someone appointed as an ambassador by his *patria* came to the city of Rome after undertaking the embassy and before it was completed bought a house which was situated in his own community of Nicopolis. The question arose whether his action fell within the terms of the decree of the senate by which ambassadors are debarred from devoting themselves to business or private affairs before the completion of the embassy. The reply was that it seems not to be covered.

14 (13) PAPINIAN, *Replies, book 1:* A replacement provided at his own volition for the *munus* of another will be forced to undertake an embassy when his turn comes without the admission of the two year interval.

15 (14) ULPIAN, *Praetor's Edict, book 74:* Someone who is absent on an embassy which allows him to do what he wishes is not regarded as being away on public business; for he is absent not to serve the public interest, but his own.

16 (15) MODESTINUS, *Rules, book 7:* Someone who is undertaking an embassy cannot present a petition about other affairs of his without the permission of the emperor.

17 (16) MODESTINUS, *Rules, book 8:* There is no bar on the same person undertaking several embassies especially if he proves that expense and journey time are reduced. 1. If a

business matter arises for someone before an embassy is undertaken, he ought to be defended even if he is absent; once an embassy is undertaken, he may not perform any task except a *munus* which is imposed on him.

18 (17) POMPONIUS, *Quintus Mucius, book 37:* If someone strikes an ambassador of the enemy, he is regarded as having acted against the law of nations, because ambassadors are regarded as sacred. And likewise if, when the ambassadors of some people were with us and war was declared against it and the reply was given that they were free to remain; for this befits the law of nations. So Quintus Mucius was accustomed to reply that someone who struck an ambassador was surrendered to the enemy whose ambassador he was. If the enemy did not accept him, the question arose whether he remained a Roman citizen. Some people thought that he did, some the opposite, because whomsoever the people had once ordered to be surrendered seemed to have been expelled from the state, as happened when someone was forbidden fire and water. Publius Mucius seems to have held this view. But the question arose most notably in the case of Hostilius Mancinus, whom the Numantines did not accept when he was surrendered to them; a law was later passed about him, however, making him a Roman citizen, and he is even said to have held the praetorship.

8

THE ADMINISTRATION OF PROPERTY BELONGING TO THE [PROVINCIAL] COMMUNITIES

1 ULPIAN, *Disputations, book 10:* Anything left to the particular use of a community cannot be converted to other uses.

2 ULPIAN, *Opinions, book 3:* It is by no means appropriate for the basis of earlier contracts of hire, which had their own formats, to be investigated starting from a later contract. 1. Anything which a man is debarred from doing in his own person he is also debarred from doing through a subordinate. And so if a decurion through intermediaries farms public property which cannot legally be rented by decurions, it is to be resumed as having been taken over illegally. 2. If anything has been converted to another use from the corn account, it is to be returned with the proper interest to its proper account. And even if this decision has been made against someone who is absent, any complaint is in vain. The basis of administration, however, is to be taken as being the trustworthiness of records, receipts, and expenses. 3. A debtor to the corn account is to settle as soon as possible from his own resources. For the corn account which is necessary to all communities must not suffer from delayed payment; but debtors may be forced to payment by the governor of the province if he has any in this position. 4. Money given for the purchase of corn must be restored to a community and not balanced by money spent on services to the community. But if money for corn has been converted to other uses than those, for which it was intended, as, for instance, the building of public baths, even if it can be shown that this was done in good faith, it is not right for the amount to be credited as far as the corn account is concerned, but the *curator rei publicae* will order the actual amount to be paid. 5. If settlement of a debt to the corn account is made with interest, the limit to excessive and illegal computation, namely on compound interest, is not applied. 6. The *curator rei publicae* may order restitution to be made to an owner of the value of grain removed wrongfully after a purchase which is made for the public account. 7. If someone who was suitable at the time when he was nominated later suffers a decline in wealth and causes loss to the community because of his debts, because no human counsel can foresee chance disasters, the man who nominated him is not obliged to pay anything under this head. 8. The law of a community cannot be altered by an agreement for the magistrates to be less liable even on behalf of a colleague under those heads where liability is legally possible. 9. But an action which is usually decided on under these heads against a colleague falls in equity to the man who spends on behalf of someone else. 10. Whatever is shown to have been spent by a magistrate on

behalf of a colleague, the governor of the province will order to be paid by his heirs.

3 (2, 11) ULPIAN, *Opinions, book 3:* After the contractor for the completion of a job had been punished, the verbal guarantor who had stood surety for him had contracted out the completion of the same building to someone else; and when the building was not completed by the second contractor, the heir of the verbal guarantor must not refuse to pay the interest on the money involved, since even the first case bound the verbal guarantor completely in a contract of good faith and the later contract, because he accepted that he was at risk, involved him in complete settlement to the community. 1(12). Those who acted as verbal guarantors for the collector of tax for the entire contract are rightly liable also for the interest, unless there is some explicit provision in the terms of the obligation in their case. 2(13). But if in the renting out of property there is in the agreement some provision for a season of blight in relation to the making of payment for each year, at the discretion of an upright arbitrator, good faith is to be observed once the terms of the contract have been investigated.

4 (3) PAPINIAN, *Replies, book 1:* The administrators of a shared task, once the sum has been shared out which it was agreed that they should all give as a whole to the community, are not freed of risk on behalf of each other. ULPIAN: The first person liable, on the analogy of a tutor, is the man who undertook the task.

5 (3, 1) PAPINIAN, *Replies, book 1:* A *curator rei publicae* rented out public land for five years without extracting suitable surety and levied from the tenant the rent for his term of office. If for the remaining period the tenant delayed paying what remained and the rent could not be got even from the produce of the land, the successor and not the curator who let the land out will be liable. The same provision was not originally enforced in this way in the collection of taxes, namely that everyone should bear the risk for their term of office. 1(2). It is not right for an action to be denied after the end of his term against a man who in the period of his administration by making a novation provided surety for a sum to creditors of the community. The position of someone who established that settlement was being made is different; for he seems to be in the position of someone who sold or let out something on behalf of the community. 2(3). A son must not be forced to provide surety for his father when he has been made *curator rei publicae*; nor does it make any difference if his father transferred some of his property to him as a gift after he [the son] had been emancipated and before he [the father] was made curator. 3(4). A verbal guarantor when asked in connection with a magistracy actually gave pledges specially; the pledges are regarded as given for those circumstances in which action is rightly taken, namely after the man on whose behalf he acted was unable to manage the affair.

6 (4) VALENS, *Fideicommissa, book 2:* It is not lawful to convert money left to a municipality for any purpose other than that designated by the deceased without the authority of the emperor. And so if he instructed one building to be erected which cannot be done because of the provisions of the *lex Falcidia*, it is possible to convert the sum which becomes available as a result to the purpose which seems most necessary to the community. If several sums are left for several buildings and because of the provisions of the *lex Falcidia* what is left is not sufficient for the construction of all the buildings, it is possible for the money to be spent on one building which the community desires. But the senate has forbidden money left to a municipality so that wild-beast shows and games may be given from income thereon to be spent on those purposes. And it is possible for money left for whatever seems most necessary to the *municipes* to be spent in any way such that the munificence of the testator is noted in the inscription on it.

7 (5) PAUL, *Views, book 1:* Decurions may not be forced to provide corn at a price cheaper than the price of corn at the time in their *patria*. Unless money is left specifically for new building, it is to be used for repairing an existing building.

8 (6) ULPIAN, *Praetor's Edict, book 1:* The magistrates of a community must not only [avoid] bad faith and clear negligence but also must furthermore [display] diligence.

9 (7) PAUL, *Praetor's Edict, book 1:* If a son-in-power holds a magistracy at his father's wish, Julian held that the father was liable for the whole of the loss suffered by a community because of him.

10 (8) MODESTINUS, *Rules, book 8:* The reversal of an error in accounting will be accepted even after ten or twenty years. But if the accounts are said to have been reckoned up corruptly, they will not be accepted [as being in error].

11 (9) PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus issued a rescript to the effect that interest was to be exacted on money which remained with curators. However, the risk arising from the capital which cannot be recovered from the contractors for buildings belongs to curators. Likewise, they issued a rescript to the effect that this risk belongs also to the heirs of curators. 1. They likewise issued a rescript to the effect that the curator of a community ought to recover the land of a community, even if it is held by purchasers in good faith when they can have recourse against the vendors concerned.

12 (9, 3) PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus issued a rescript to the effect that the exaction of services is not to be done without surety. 1(4). They likewise issued a rescript to the effect that curators are liable for the sum in question if they behaved negligently in dividing up property, for double if fraudulently; and the penalty did not descend to their heirs. 2(5). Likewise, that a curator must exact money intended for the corn supply if property has been divided up. 3(6). Likewise, that *sitonai* who have not been dilatory in the execution of their duty, must not suffer loss, as laid down in a letter of Hadrian. 4(7). Likewise, that surety must not be extracted from the curator of an archive when he is chosen by the governor after an investigation. 5(8). Likewise, that a curator is also liable on account of his colleague if he was in a position to intervene and block him. 6(9). Likewise, that in the case of headings whose position has worsened during the term of a curator, the risk is his; but in the case of things which were not as they should be before he became curator it was reasonable to hold that the risk was not his.

13 (9, 10) PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus issued a rescript to the effect that someone who had held public money during his magistracy and for some time after ought to provide interest, unless he could produce some reason for having paid it in late.

9

DECREES MADE BY AN *ORDO*

1 ULPIAN, *Opinions, book 3:* The decision on the doctors to be included within a prescribed number is not entrusted to the governor of a province but to the *ordo* and the landholders of each community, so that they themselves, being certain about their uprightness and skill, may choose men to whom they may entrust themselves and their children when ill.

2 MARCIAN, *Public Affairs, book 1:* Those decrees which are made when the proper number of decurions is not present are not valid.

3 ULPIAN, *Appeals, book 3:* It is, however, laid down in the *lex municipalis* that the *ordo* may not meet except when two thirds are present.

4 ULPIAN, *Duties of Curator Rei Publicae, sole book:* Decrees of decurions which favor individuals are to be rescinded, whether they let off some debtor or give money away. 1. Also as happens, if they have granted from the public domain an estate or a house or something to someone, a decree of this kind will not be valid. 2. But also if the decurions have decreed a salary to someone, this decree will sometimes be of some

effect, for instance, if a salary was [already] established for a liberal art or for medicine; for salaries may be established for these reasons.

5 CALLISTRATUS, *Judicial Examinations, book 2:* The deified Hadrian issued a rescript to the Nicomedians to the effect that what the *ordo* had once decreed must not be repealed except for cause, that is, if the repeal of the earlier decree relates to the public good.

6 SCAEVOLA, *Digest, book 1:* It was laid down in the *lex municipalis* that if anyone judges outside the *curia*, he is to be removed from the *curia* and is to pay in addition a fine of a thousand drachmae. The question arises whether he should suffer the penalty if he acted against the decree in ignorance. One replies that penalties of this particular kind are designed for those who know what they are doing.

10

PUBLIC WORKS

1 ULPIAN, *Opinions, book 2:* Someone appointed as a curator of works and prevented by prescription from the implementation of release, while he leaves his heirs bound under the heading of noncompletion, to which he was subject as long as he lived, does not subject them to any burden which relates to the period falling after his death. 1. Someone had later undertaken the care of building an aqueduct although already involved in another *munus*. It seemed unreasonable of him to ask to be relieved of the earlier [*munus*] when involved in them both, when, if it had been right for him to bear only one, he would previously have been likely to gain release from the later [*munus*] on the grounds of the first *munus*.

2 ULPIAN, *Opinions, book 3:* Someone who gave his income for the time being toward the completion of public works from liberality and not because of the constraint of a debt is not to be prevented by envy from enjoying the fruit of his munificence in the form of the inscription of his name on the buildings. 1. However, the curators of works deal with the contractors, the community, with those whom it put in charge of completing the work. Therefore, how far anyone is bound, who is bound, and to whom lie within the discretion of the governor of the province. 2. The governor of the province must use his authority to prevent the erasure of the name of the man by whose liberality a building was erected and the substitution of other names and as a result the withdrawal of similar gifts by citizens to their *patriae*.

3 MACER, *Duties of Proconsul, book 2:* A private individual may undertake a new project even without the permission of the emperor, except if it is to outdo another citizen or causes sedition or is a circus, theater, or amphitheater. 1. But it is laid down in *constitutiones* that a new project at public expense cannot be undertaken without the permission of the emperor. 2. And it is not lawful for any other name to be inscribed on a public building than that of the emperor or of the man by whose money it was built.

4 MODESTINUS, *Encyclopaedia, book 11:* Nor will it be lawful to add the name of the governor.

5 ULPIAN, *Duties of Curator Rei Publicae, sole book:* In the case of a legacy or a *fideicommissum* left for a building, a rescript of the deified Pius thus prescribes what interest is owed and when: "If, indeed, the day is not prescribed by the men who left the legacies for the erection of statues or images, the time is to be fixed by the governor of the province. And unless the heirs erect [the statues or images], they must pay the community moderate interest for six months, otherwise six percent. But if a day is prescribed, they must put the money down before that day, if they claim not to be able to get the statues or are engaged in controversy over the position; otherwise, they must pay six percent at once." 1. It is not right for public property to be held by private individuals. So the governor of the province will take care to separate what-

ever is public property from private and thus increase public revenue; if he finds any public places or buildings passed to private use, he will calculate whether they are to be claimed as public property or whether it is better to impose a rent on them, and he will carry out whatever he reckons to be better for the community.

6 MODESTINUS, *Encyclopaedia, book 11:* The deified Marcus issued a rescript to the effect that if a governor was approached about public works which related to walls or gates or public harbors or if walls were being built, he must consult he emperor.

7 CALLISTRATUS, *Judicial Examinations, book 2:* The deified Pius issued a rescript to the effect that money bequeathed for new building was rather to be converted to the upkeep of those which already existed than spent on beginning a building, that is, if a community had enough buildings and money was not easily found for their repair. 1. If someone undertook to decorate a building erected by someone else with marble or to do it in some other way according to the will of the people, with his name to be included in the inscription and the inscriptions to remain of the earlier benefactors who had erected the building, the senate decreed that the project should go ahead. And if private individuals add some money from their own resources for buildings which are being erected from public funds, it is laid down in the same mandates that they should organize the inscription in such a way as to record the sum which they had contributed for the building.

11

MARKETS

1 MODESTINUS, *Rules, book 3:* By not using for a period of ten years the right to hold a market granted by the emperor the man who acquired the right loses it.

2 CALLISTRATUS, *Judicial Examinations, book 3:* If the actual farmers or fishermen have been ordered to bring things into a city to sell them themselves, the supply of corn will be interrupted when the country people leave their work; they ought, as soon as they have brought their wares in, to hand them over and return to their work. Indeed, when Plato, a man of the highest reputation among the Greeks for good sense, was laying down how a state could be well and happily run, he regarded the tradesmen as particularly necessary. For in the second book of the *Republic* he says: "One will need then a number of farmers and other workers and other people whose function is to import and export things. These will be called traders. And when a farmer or any other worker has brought any of his produce to market, if he does not come at the same time as those who need to acquire things from him, will he sit in the market abandoning his work? 'Certainly not,' he said, 'but there are people who realize this and provide themselves for this service.'"

12

UNDERTAKINGS

1 ULPIAN, *Duties of Curator Rei Publicae, sole book:* If someone has undertaken to build something for a community or to give money, he will not be liable for interest; but if he starts to delay, interest will accrue, as is laid down in a rescript of our emperor with his deified father. 1. But it must be realized that someone who has made an undertaking is not always bound. If a man has promised something in return for an office already granted to him or to be granted or for any other proper reason, he will be bound by his undertaking; but if he has promised for no reason, he will not be

bound. And this provision occurs in many *constitutiones* both old and new. 2. Likewise, if someone promised for no reason but began to carry out his promise, he is bound. 3. We regard a beginning as the laying of the foundations or the clearing of the site. And, indeed, if a site is designated at his request, it looks more as if he has begun. Likewise, if he has deposited equipment or money in public hands. 4. And, indeed, even if he has not begun himself, but if he had promised a certain sum for a building and the community in expectation of this sum had begun to build, he is bound on the grounds that the work is as it were begun. 5. Finally, when someone had promised some columns, our emperor with his deified father issued a rescript in these terms: "Those who promise money to a community for no reason are not compelled to carry their liberality through. But if you promised columns to the people of Citium and on that basis the work has been begun at the expense of the community or of private individuals, it is not right for something which has been undertaken to be abandoned." 6. If someone has assigned [to the community] a building which he has completed and thereafter by chance it suffers some damage, the responsibility does not lie with the man who built the building according to a rescript of our emperor.

2 ULPIAN, *Disputations, book 1:* If someone has vowed to dedicate something, he is bound by his vow. This binds the person who makes the vow not the object which is vowed. For when the thing which is vowed is dedicated, it releases the man from the vows, but is not itself made sacred. 1. But heads of a family who are mature are bound by a vow; for a son-in-power or a slave is not bound by a vow without the authority of father or master. 2. If someone has vowed a tithe of his property, the tithe does not cease to be part of his property until it has been detached. And if it happens that a man who has vowed a tithe dies before he has detached it, his heir as heir is bound to pay the tithe. For it is agreed that the obligation of a vow is transferred to the heir.

3 ULPIAN, *Disputations, book 4:* A pact is an agreement and convention of two people, but an undertaking is the promise only of the person who makes it; and so it is established that if an undertaking has been made on account of an office, it is to be fulfilled as if it were a debt. And, moreover, a building once begun, even if it was not promised on account of an office, must be completed by the man who promised it and this is what is established. 1. If anyone wishes to claim back from his *municipes* something which he had handed over as a result of an undertaking, his petition is to be rejected; for it is fairest if intentions of this kind once evinced toward communities are not abandoned as a result of second thoughts. And even if the *municipes* have ceased to hold something, one must say that an action is to be granted to them.

4 MARCIAN, *Institutes, book 3:* If anyone has promised anything because of a fire or an earthquake or any disaster which has happened to a community, he is bound.

5 ULPIAN, *Replies, book 1:* Reply is made to Charidemus that someone cannot be compelled to perform as a result of a letter which he sent in absence in order to proffer a *munus.*

6 ULPIAN, *Duties of Proconsul, book 5:* The reduction of an undertaking in the person of an heir takes place whenever the undertaking was not made on account of an office. But if it was made on account of an office, it is regarded as equivalent to a debt and is not reduced in the person of the heirs. 1. If anyone has promised money not on account of an office and has begun to pay, our Emperor Antoninus issued a rescript to the effect that he must pay as in the case of a building which has been begun. 2. One must realize that not only men but also women must fulfill an undertaking if they have made it on account of an office; and this is what is contained in a rescript of our emperor and his deified father. 3. If a community has imposed on anyone the necessity of erecting statues of the emperor, if he has not promised to do so, there is no obligation on him to obey, as is laid down in rescripts of our emperor and his deified father.

7 PAUL, *Duties of Proconsul, book 1:* If someone has promised to do something because of a disaster which a community has suffered, even if he has not begun to do it, he is completely bound, as the deified Severus said in a rescript to Dio.

8 ULPIAN, *Duties of Consul, book 3:* The deified brothers issued a rescript to Flavius Celsus to the effect that there was a judicial examination by judges about undertakings made to a community in these words: "Statius Ruffinus will behave correctly if he completes the building of the proscaenium which he promised the people of Gabil that he would build and which he has at least begun. For even if he has had the ill fortune to be exiled by the prefect of the city for three years, he should not diminish the favor involved in the public building which he offered of his own free will, since even in absence he can complete the building with a friend or intermediary. And if he declines, appointed agents, who can legally act on behalf of the community will be able to approach judges in prosecution of him on the public behalf; these judges, as soon as possible, will hear the case before he sets off for exile and if they establish that the work ought to be completed by him they will order him to obey the community in this case or they will forbid the sale of the farm which he has in the territory of the Gabines."

9 MODESTINUS, *Distinctions, book 4:* An individual is completely bound for the entire sum by an undertaking which he has made in a community on account of an office; and his heir is bound for the entire sum by a promise made on account of an office; but in the case of a building which has been promised and begun, if the property is insufficient to fulfill the liberality, an heir outside the family is bound up to a fifth of the patrimony of the dead man, children up to a tenth—all this according to a rescript of the deified Severus and Antoninus. And further the deified Pius established that if the donor himself was reduced to poverty he owed the fifth part of his patrimony as a result of a promise of a building which had been begun.

10 MODESTINUS, *Replies, book 1:* Septicia promised a show to her community by promising on condition that the capital remained with her and she herself paid six percent interest for the prizes of the contestants in these words: "I undertake and consecrate a four-yearly contest with a capital of thirty thousand denarii, myself holding the money which forms the capital and depositing with the *decaproti* sufficient surety for my paying the usual interest on thirty thousand denarii with my husband as master of ceremonies and president and thereafter my children. And the interest will go to the prizes of the artists as the council decides for each contest." The question arises whether the sons of Septicia can suffer the injury of being deprived of the presidency of the contest according to the terms and condition of the undertaking. Herennius Modestinus replies that if the establishment of the contest was lawful, the form of the undertaking is to be preserved.

11 MODESTINUS, *Encyclopaedia, book 9:* If someone has promised money on account of an office or priesthood and dies before he takes up the office or magistracy, it is laid down in imperial *constitutiones* that his heirs should not be pursued for the money which he had promised for the honor or magistracy unless by chance the building was begun by him or by the community while he was alive.

12 MODESTINUS, *Encyclopaedia, book 11:* We cannot place statues to others in private buildings against the will of those who erected them, as is contained in a rescript of the deified Severus. If someone promised a building in order not to hold office, the deified Antoninus issued a rescript to the effect that he was to be forced to hold office rather than erect the building.

13 PAPIRIUS JUSTUS, *Constitutiones, book 2:* The Emperors Antoninus and Verus issued a rescript to the effect that those who promised buildings on account of an office must build them and not be forced to contribute money instead. 1. Likewise, they issued a rescript to the effect that conditions imposed on gifts made to a community are only valid if it is for the public good; and if they are damaging, they must not be observed. And so it is not right to observe the provision of the deceased that if a certain sum was left tax was not to be levied. For those things are tolerable, which are hallowed by ancient custom.

14 POMPONIUS, *Letters and Various Readings, book 6:* If someone has promised on account of his own or another's office that he would erect a building in some community, he and his heir are equally bound to complete the building, according to a *constitutio* of the deified Trajan. But if someone has promised to erect a building in some commu-

nity not on account of an office and has begun it and has died before completing it, an heir from outside the family must either complete it or if he prefers give a fifth part of the patrimony left him by the man who had begun to erect the building to the community in which the erection of the building was going on; but he who is among the sons, if he is an heir, is bound to contribute not a fifth part but a tenth. This is what the deified Antoninus established.

15 ULPIAN, *Duties of Curator Rei Publicae, sole book:* The deified Pius issued a rescript to the effect that among the sons is included the grandson born from a daughter.

13

VARIOUS AND EXTRAORDINARY JUDICIAL EXAMINATIONS AND IF A JUDGE IS SAID TO HAVE NEGLECTED HIS DUTY

1 ULPIAN, *All Seats of Judgment, book 8:* The governor of a province regularly settles the law on salaries, but only for the teachers of the liberal pursuits. We regard as liberal pursuits those which the Greeks call *eleutheria.* Rhetors will be included, grammarians, geometricians. 1. The claim of doctors is the same as that of teachers, perhaps even better, since they take care of men's health, teachers of their pursuits. And as a result in their case also judicial hearings must take place outside the regular system. 2. And let governors also hear cases involving obstetricians, who seem to practice a sort of medicine. 3. Some will perhaps regard as doctors those also who offer a cure for a particular part of the body or a particular ill, as, for instance, an ear doctor, a throat doctor, or a dentist. But one must not include people who make incantations or imprecations or, to use the common expression of impostors, exorcisms. For these are not branches of medicine, even though people exist who forcibly assert that such people have helped them. 4. But are philosophers also to be included among teachers? I should not think so, not because the subject is not hallowed, but because they ought above all to claim to spurn mercenary activity. 5. Likewise, governors should not hear cases involving teachers of civil law; knowledge of civil law is indeed a most hallowed thing, but something which is not to be valued in terms of money or dishonored by seeking in court a fee which should have been offered voluntarily when someone began to follow such a calling. 6. Although also masters of an elementary school are not teachers, nonetheless, the custom has arisen that cases involving them should be heard, also those involving archivists and shorthand writers and accountants or ledgerkeepers. 7. But the governor of a province must not hear outside the regular system cases of workers or craftsmen in fields other than those involving writing or shorthand. 8. And if assistants ask for a salary, they are in the same position as is established for teachers. 9. And the governor must take cognizance of all such claims, since the deified brothers issued a rescript to the effect that they might be proceeded against as one proceeds against advocates. 10. As regards the fees for advocates, the judge must proceed in such a way that he sets the level in relation to the nature of the case and the skill of the advocate and the custom of the circuit and the court in which the advocate was to plead, provided the amount does not exceed the legal fee; for this is the provision of a rescript of our emperor and his father. The words of the rescript are as follows: "If Julius Maternus, whom you wished to be the advocate in your case is prepared to take the case which was entrusted to him, you may reclaim only the amount of money which exceeds the legal limit." 11. We must regard as advocates all those at any rate who work on pleading cases with a certain degree of application; but those who regularly receive remuneration for drafting a case without being present at the hearings will not be regarded as advocates. 12. If surety has been provided to someone for a fee or if anyone has made a pact over a suit, we must consider whether he can claim. And, indeed, there is a rescript about pacts by our emperor and his deified father in these terms: "You yourself admit that money was wrongly promised to you for a suit. But this applies if a surety promises a share in a future emolument if the

suit is suspended. But if the fee is promised with a surety after the case is heard, it can be claimed up to the amount which can be proved, even if the caution is under the heading of a fee for a successful advocate; on this basis, however, namely that what has been paid is reckoned with what is owed and no total exceeds the lawful amount." The lawful amount for each case is regarded as being up to a hundred aurei. 13. The deified Severus forbade a fee to be claimed back from the heirs of an advocate after his death, because it was not his fault that he did not plead the case. 14. The duties of a governor or praetor relate also to nursing; for nurses claim what is owed to them for nursing children from governors. But we regard nursing as lasting as long as infants are breast-fed; after this the role of the governor or praetor ends. 15. If all these claims are made before governors, we must consider whether governors can take cognizance about claims over loans for consumption. And I should think that they must be admitted.

2 ULPIAN, *Opinions, book 1:* Reply has been made that the governor of a province must be informed about taking of water, about new channels made illegally, about horses wittingly possessed by someone other than their owner and their offspring, and about loss caused by the admission on to the estate of someone of all the men [transhuman shepherds] who should have been distributed over the estates of several, provided this was done without the permission of someone entitled to give orders in order that he may provide a proper framework for the case according to the nature of the case and the order of jurisdiction.

3 ULPIAN, *Opinions, book 5:* If a doctor to whom someone with bad eyes entrusted their treatment, by raising the danger of losing them as a result of harmful medicaments, forced the man while sick to sell his possessions to him contrary to good faith, the governor of the province is to block the illegal act and order restitution to be made.

4 PAUL, *Plautius, book 4:* The deified Antoninus Pius issued a rescript to the effect that those learned in the law who claimed salaries could exact them.

5 CALLISTRATUS, *Judicial Examinations, book 1:* The number of judicial examinations, since it arises from various causes, cannot easily be divided into categories, unless this is done schematically. But the number of judicial examinations can perhaps be divided into four categories; for it is either a question of the undertaking of offices and *munera*, or of property, or of someone's status, or of a capital offense. 1. Status is a position of unimpaired standing, which is established by law and custom and under the authority of the laws may be reduced or removed by our delict. 2. Status is reduced if we are assigned a penalty which affects our standing, although liberty remains, as, for instance, if someone is banished or removed from the *ordo* or debarred from holding public office or if a plebeian is beaten with rods or assigned to forced labor or if anyone falls under any heading which is listed in the perpetual edict as bringing infamy. 3. Status is removed if *magna capitis minutio* occurs, that is, if deprivation of liberty occurs, as, for instance, if someone is forbidden fire and water, which occurs when he is deported or if a plebeian is assigned to mine work or to a mine; for it makes no difference, nor is there any distinction between a public work and a mine, except that those who escape from a public work are punished not by death, but by assignment to a mine.

6 GAIUS, *Common Matters or Golden Words, book 3:* If a judge has heard his own case, he does not seem to be strictly speaking bound because of delictal activity; but because he is not bound under the law of contract and yet has clearly done something wrong, even if by inadvertence, as a result he seems to be bound as it were because of delictal activity by an action arising out of the act and will pay a penalty for as much as seems right in the affair in the conscientious judgment of the judge.

14

SLAVE-TRADING MATTERS

1 ULPIAN, *Sabinus, book 42:* Cases of slave-trading are prosecuted rightfully by law.

2 ULPIAN, *Edict, book 31:* If a slave-trader has become a surety in the recording of a debt, as many of them do, we must see if he can be held liable as a mandator. And I think that he cannot be held, since he rather indicates than mandates the debt, although he approves it. I hold the same view even if he has accepted something as an act of charity; nor will there be an action on hire. Clearly, if he has got the better of a creditor by clever deceit, he will be subject to an action for deceit.

3 ULPIAN, *All Seats of Judgment, book 8:* Governors usually hear cases concerning slave-trading, although it is demeaning, but in such a way that in these affairs also there is a limit both to the amount at stake and to the affair in which they performed their small service or provided some assistance. It is more difficult for what the Greeks call *hermeneutikon* to be the subject of an action before them, if perchance a slave-trader was in a position of friendship or assessorship or something else of that kind; for there are functions for this kind of man, as one would expect in so large a state. For there is a kind of slave-trader who is useful in a not unreasonable way in sale and purchase and *commercia* and lawful contracts.

15

CENSUSES

1 ULPIAN, *Censuses, book 1:* One must realize that there are some colonies with *jus Italicum*, as in Syria Phoenice, the most splendid colony of the Tyrians, which is my place of origin, outstanding in its territories, of very ancient foundation, powerful in war, always loyal to the treaty it made with the Romans; for the deified Severus and our emperor granted it *jus Italicum* because of its great and conspicuous faithfulness toward the Roman state and empire. 1. But the colony of Berytus also in the same province was raised up by favor of Augustus and is, as the deified Hadrian says in a speech, an Augustan colony which possesses *jus Italicum*. 2. There is also the colony of Heliopolis, which received from the deified Severus on the occasion of civil war the status of an Italian colony. 3. There is also the colony of Laodicea in Syria Coele to which the deified Severus granted *jus Italicum* because of its services in civil war. For the colony of Ptolemais, which lies between Phoenice and Palestine, has nothing but the name of colony. 4. But our emperor also gave the status of colony to the community of Emisa in Phoenice and conferred the *jus Italicum* on it. 5. There is also the community of Palmyra in the province of Phoenice, sited near the peoples and nations of the barbarians. 6. In Palestine there were two colonies, Caesarea and Aelia Capitolina, but neither has the *jus Italicum*. 7. The deified Severus also founded a colony in the community of Sebaste. 8. In Dacia also the colony of Zerna was founded by the deified Trajan with the *jus Italicum*. 9. Zarmizegetusa also has the same status. Likewise, the colonies of Napoca and Apulum and the village of Patavissa [Potaissa]

which successfully petitioned the deified Severus for the status of colony. 10. And in Bithynia there is Apamea and in Pontus Sinope. And in Cilicia there is Selinus also known as Traianopolis.

2 ULPIAN, *Sabinus, book 28:* The flaws in earlier censuses disappear when the new lists are compiled.

3 ULPIAN, *Censuses, book 2:* It is necessary to indicate age in compiling censuses, because age confers on some people nonpayment of tax; for instance, in the provinces of Syria men are bound to pay poll-tax from fourteen, women from twelve, in both cases up to sixty-five. The relevant age is that at the time of the census. 1. It is rightly laid down in a rescript of our emperor to Pelignianus that immunity conferred on objects must not lapse; for immunity granted to persons dies with them, that granted to things never lapses.

4 ULPIAN, *Censuses, book 3:* It is laid down in the list of rules for the census that land must be entered in the census in this way: the name of each property, the community, and the *pagus* to which it belongs, its nearest two neighbors; then, how many *jugera* of land have been sown for the last ten years, how many vines vineyards have, how many *jugera* are olive-plantations and with how many trees, how many *jugera* of land have been used for hay for the last ten years, how many *jugera* of pasture there are, likewise of wood for felling. The man who declares anything must value it. 1. A census-taker should respect equity in that it is appropriate to his office for a man to be relieved who for particular reasons is unable to enjoy the extent of land declared in public records. So if part of his land has been lost in an abyss, he should be relieved by the census-taker. If his vines are dead or his trees have died of drought, it is unjust for their number to be listed in the census; but if he has cut down trees or vines, nonetheless, he is commanded to declare their number as it was at the time of the census, unless he has shown good reason for cutting them down to the census-taker. 2. A man who possesses land in another community must declare it in the community in which it is situated. For land tax must relieve that community in whose territory it is owned. 3. Although in some cases favors of immunity granted to persons are extinguished with their death, nonetheless, in general, immunity is regarded as granted to places or communities in such a way that it is transmitted to succeeding generations. 4. If, since I owned a farm, I declared it, but a man who claimed ownership did not declare it, it is right that his claim should remain. 5. In declaring slaves, one must see that their nationalities and ages and functions and skills are separately declared. 6. A proprietor must also declare for the census lakes with fish and harbors. 7. If estates possess saltpans, they too must be declared for the census. 8. If anyone has not declared a *colonus* or *inquilinus*, he will be liable to the penalties relative to the census. 9. Things born or acquired after the compilation of the census may be added to the declarations within the period when the census is going on. 10. If anyone has asked leave to be allowed to correct the census and then realized after he has been granted this that he need not have asked, because the matter did not require correction, rescripts have very often been issued to the effect that no prejudice will attach to him because he asked to correct the census.

5 PAPINIAN, *Replies, book 19:* If in order to expedite the affair a single owner is prosecuted under the law of taxation, the man who is prosecuted is allowed by the imperial treasury actions against the others whose estates are equally liable, of course, so that all may contribute the tax money according to the size of their estates. Nor are the actions allowed to no purpose, although the imperial treasury has recovered its money, since the sum is regarded as received from the debts of sellers. 1. Those who restore

estates as a result of a *fideicommissum* without taking account of taxation have an action under the ruling of the deified Pius Antoninus, an action which he wished to be available even when a legacy had been paid. 2. The offer of a monetary surety to prevent an estate being seized as a pledge is not allowed in the case of tax money which has not been paid on the due day; nor will a hearing be accorded to a legatee making a contrary claim over tax in arrears on the grounds that the heir is paying along with the man who was placed in charge of receiving tax.

6 CELSUS, *Digest, book 25:* The colony of Philippi possesses *jus Italicum.*

7 GAIUS, *Lex Julia et Papia, book 6:* Troas, Berytus, and Dyrrachium possess *jus Italicum.*

8 PAUL, *Censuses, book 2:* In Lusitania the Pacenses and Emeritenses possess *jus Italicum.* The Valentini and Ilicitani have the same status. The Barcinonenses there are also immune. 1. The Lugdunenses in Gaul and likewise the Viennenses in Narbonensis possess *jus Italicum.* 2. In lower Germany the Agrippinenses possess *jus Italicum.* 3. Laodicea in Syria and Berytus in Phoenice possess *jus Italicum,* and also their territory. 4. The city of Tyre was made of the same status by the deified Severus and Antoninus. 5. The deified Antoninus made Antioch a colony, reserving the right of taxation. 6. Our Emperor Antoninus made the city of Emesa a colony possessed of *jus Italicum.* 7. The deified Vespasian made Caesarea a colony without adding that they should possess *jus Italicum,* but he remitted the poll-tax there; and the deified Titus then interpreted the ruling to mean that their territory had also been made immune. The Capitolienses seem to be in the same position. 8. In the province of Macedonia, the Dyrracheni, Cassandrenses, Phillippenses, Dienses, and Stobenses possess *jus Italicum.* 9. In the province of Asia, there are two communities with *jus Italicum,* Troas and Parium. 10. In Pisidia, the colony of Antioch possesses the same status. 11. In Africa, Carthage, Utica, and Leptis Magna were granted *jus Italicum* by the deified Severus and Antoninus.

16

THE MEANING OF EXPRESSIONS

1 ULPIAN, *Edict, book 1:* This expression "if anyone" covers both men and women.

2 PAUL, *Edict, book 1:* The designation "city" relates to the area within the walls; the designation "Rome," however, includes also the adjoining buildings which is a larger area. 1. "The greater part of each day" is the first seven hours of the day not the last.

3 ULPIAN, *Edict, book 2:* "Twenty miles a day are to be covered in the course of the journey" is to be understood in such a way that if, after this computation, less than twenty miles remain, they may occupy a whole day. Thus, if there are twenty-one miles, two days are allotted to them. This computation is of course only to be done if there is no agreement about the day. 1. It is not possible to talk about the inheritance of someone who died in enemy hands since he died a slave.

4 PAUL, *Edict, book 1:* Proculus says that by the designation "name" the thing is meant.

5 PAUL, *Edict, book 2:* The designation "thing" is wider than "money" because it contains things which are outside the sum of our patrimony, while the meaning of money relates to those things that form part of our patrimony. 1. By hire of *opus* Labeo says that by these words is meant that *opus* which the Greeks call *apotelesma* not that which they call *ergon*, that is, some completed product of an executed *opus*.

6 ULPIAN, *Edict, book 3:* The designation "name" and "thing" relates to every contract and obligation. 1. The expression "according to the law" is to be understood as referring to intention of the laws as well as to their express statements.

7 PAUL, *Edict, book 2:* "*Sponsio*" designates not only something which results from a request for *sponsus* but every stipulation or promise.

8 PAUL, *Edict, book 3:* The expression "it will be necessary" covers both the present and the future. 1. No defense is included in the word "action."

9 ULPIAN, *Edict, book 5:* Marcellus as reported by Julian remarks that by the word "destroyed," cut up, broken, and forcibly abstracted are meant.

10 ULPIAN, *Edict, book 6:* It is agreed that by "creditors" are understood those who are owed anything as a result of any action or process either under the civil law, without any allowance for permanent exceptions, or under imperial enactment or under any extraordinary enactment, whether at once or after a delay or with some condition attached. But if the thing be due by natural obligation, they are not in the position of creditors. But if money on loan is not involved, but a contract, creditors are accepted.

11 GAIUS, *Provincial Edict, book 1:* Under the designation "creditors," there are understood not only those who have lent money but everyone to whom something is owed for whatever reason,

12 ULPIAN, *Edict, book 6:* for instance, if anyone is owed something as a result of sale or hire or for any other reason. But also if something is owed as a result of a delict, it seems to me that he can be regarded as being in the position of a creditor. But if it is a *causa popularis*, the person will be correctly stated as not being in the position of a creditor before the hearing of the suit but only after. 1. He who pays late pays less; for less is paid after a time.

13 ULPIAN, *Edict, book 7:* In the designation "woman" a virgin ready for a husband is also included. 1. Things are regarded as "missing" (as Sabinus says and Pedius approves) even if their substance remains but their form is changed; and likewise if they are given back ruined or transformed, they are regarded as missing, because for the most part there is more in the value than in the thing itself. 2. A thing is regarded, however, as "ceasing to be missing" when it returns into our control in such a way that we cannot lose possession of it. 3. Therefore, something which has earlier been stolen is missing and also something which is not under human control.

14 PAUL, *Edict, book 7:* Labeo and Sabinus think that if a piece of clothing is returned torn or something is given back ruined, such as goblets which have been crushed or a picture with the design removed, the thing is regarded as being "missing" because the value of those things does not lie in their content but in their workmanship. Likewise, if an owner in ignorance bought something which had been stolen from him, it is rightly regarded as being missing even if he later realized the position, since the thing is regarded as missing for the person who has lost its value. 1. Someone is regarded as "having something missing" if he has no action for its recovery against anyone.

15 ULPIAN, *Edict, book 10:* The goods of a community are wrongly called "public"; for only those things are public that belong to the Roman people.

16 GAIUS, *Provincial Edict, book 3:* We call someone who has contracted to collect a tax of the Roman people a *publicanus*. For the designation "public" relates in a number of cases to the Roman people; for communities are regarded as being in the position of private people.

17 ULPIAN, *Edict, book 10:* We do not regard as being "public" those things which are sacred or hallowed or designed for public use but those things which are, as it were, the property of communities. But the *peculia* of slaves of communities are regarded without doubt as public. 1. We must also regard as "public" those taxes from which the imperial treasury derives revenue, such as a harbor tax or a tax on saltworks, mines, and pitch factories.

18 PAUL, *Edict, book 9:* "*Munus*" is understood in three ways: first, as a gift, whence we talk of *munera* being given or sent; second, as a burden, and when this is remitted release from military service or a *munus* is as a result called immunity; third, as a duty, whence we talk of military *munera* and call some soldiers performers of the *munera*; and, therefore, we talk of *municipes* because they undertake civil *munera*.

19 ULPIAN, *Edict, book 11:* Labeo, in the first book of the *Urban Praetor's Edict*, lays down that some things "*agantur*," some things "*gerantur*," some things "*contrahantur*"; and indeed, *actum* is a general word whether something is done verbally or executed in fact, as in a stipulation or a computation. A *contractum*, however, is something which involves an obligation on both sides, which the Greeks call *synallagma*, such as purchase or sale, hire or partnership; *gestum* means something done not verbally.

20 ULPIAN, *Edict, book 12:* The words "*contraxerunt*" and "*gesserunt*" do not relate to the law of bearing witness.

21 PAUL, *Edict, book 11:* The emperor by granting *bona* is regarded also as granting the relevant obligations.

22 GAIUS, *Provincial Edict, book 4:* More is conveyed by restitution than by presentation; for "to present" is to provide the presence of something, "to restore" is also to make someone the owner and hand over the produce; furthermore, several things are embraced in the sense of restitution.

23 ULPIAN, *Edict, book 14:* Both cases and rights are contained in the designation "thing."

24 GAIUS, *Provincial Edict, book 6:* "Inheritance" is nothing other than succession to all the rights which the dead man possessed.

25 PAUL, *Edict, book 21:* We rightly describe a "whole" property as being ours even if the usufruct belongs to someone else because usufruct is not part of ownership but is a kind of servitude, like a right of way or passage; nor is it wrong for the "whole" of something to be described as mine of which no part can be described as belonging to someone else. Julian also held this view, and it is the more probable. 1. Quintus Mucius said that by the designation as a part something indivisible was meant; for something which is ours as a part is not a part but a whole. Servius elegantly held that by the designation as a part both were meant.

26 ULPIAN, *Edict, book 16:* Scaevola writes in the eleventh book of his *Questions* that offspring is not part of something stolen.

27 ULPIAN, *Edict, book 17:* "Land" is a place which is without a building. 1. "*Stipendium*" derives its meaning from *stips* because it is put together by means of *stipes*, that is modest sums of money. Pomponius says that "*tributum*" derives its meaning in the same way. And, indeed, *tributum* derives its name from what is contributed or from what is paid to soldiers.

28 PAUL, *Edict, book 21:* The expression "alienation" comprises also usucapion; for there

can scarcely be anyone who allows something to be taken in usucapion who does not seem to alienate. Also someone who has lost servitudes by not using them is said to alienate. Someone who does not use an opportunity of acquiring something is not regarded as alienating, as, for instance, someone who does not take up an inheritance or does not take up an option granted for a fixed time. 1. Discourse which has neither conjunction or disjunction is regarded as disjunct or conjunct according to the intention of the speaker.

29 PAUL, *Edict, book 66:* For Labeo says that conjunction is sometimes regarded as disjunction: as in the stipulation "you and your heir to me and my heir."

30 GAIUS, *Provincial Edict, book 7:* "Wood for timber" is as some people think a wood which is owned for this purpose, namely to be felled. Servius thinks that it is a wood which grows again from the stock or the root when it is cut. 1. "*Stipula illecta*" consists of ears of corn cut down during the harvest but not collected, which country people glean for when they have time. 2. "*Novalis*" is land which has been cleared and left empty for a year, which the Greeks call *neasin.* 3. "Intact," however, is land onto which the owner has not yet allowed flocks for pasturing. 4. "A fallen acorn" is one which has fallen from the tree. 5. "Wood for pasture" is wood which is intended for the pasturing of flocks.

31 ULPIAN, *Edict, book 18:* "A meadow" is something where one only needs a sickle to gather the harvest; it derives its name from the fact that it is prepared for harvesting.

32 PAUL, *Edict, book 24:* "Incompletely paid" is used even if nothing has been paid.

33 ULPIAN, *Edict, book 21:* "Openly" is in the presence of several people.

34 PAUL, *Edict, book 24:* In the expression "action" the notion of prosecution is comprised.

35 PAUL, *Edict, book 17:* Someone, however, is regarded as "restoring," who at the same time also gives a contestant that position which he would have had if the thing in question had been given to him at once at the moment when the suit was begun, including suits over usucapion and usufruct.

36 ULPIAN, *Edict, book 23:* The word "suit" covers every action whether *in rem* or *in personam.*

37 PAUL, *Edict, book 26:* The expression "ought" does not relate to the discretion of a judge who can give judgment for a greater or lesser amount, but refers to the truth.

38 ULPIAN, *Edict, book 25:* Labeo defines "*ostentum*" as everything done contrary to the nature or inborn characteristics of anything. However, there are two kinds: one, whenever something unnatural is born, as, for instance, with three hands or feet or with some other part of the body which is unnatural; second, if something appears fantastic, which the Greeks call *phantasmata.*

39 PAUL, *Edict, book 53:* "*Subsignatum*" means something which is signed by someone: for people used to use the word "*subsignatio*" instead of signature. 1. "*Bona*" are regarded as what remains to someone when debts have been deducted. 2. "*Detestari*" is to denounce someone in his absence. 3. "Uncertain possessor" is someone whom we do not know.

40 ULPIAN, *Edict, book 56:* "*Detestatio*" is a denunciation made with an oath. 1. The designation "slave" refers also to a female slave. 2. In the designation "family," children also are included. 3. A single slave is not covered by the designation "family," nor do even two make a family.

41 GAIUS, *Provincial Edict, book 21:* The designation "weapons" does not only include such things as shields, swords and helmets, but sticks and stones.

42 ULPIAN, *Edict, book 57:* "*Probrum*" is the same thing as *obprobrium.* It is sometimes something which is by nature shameful, and is sometimes so by convention and as it were by the custom of the community. So, for instance, theft or adultery is by nature shameful, but to be condemned to undertake tutelage is not by nature shameful but is so by custom of the community; for something which can happen to a respectable man is not by nature shameful.

43 ULPIAN, *Edict, book 58:* In the expression "*victus*" is comprised whatever is necessary for food, drink, care of the body and the support of human life. Labeo says that clothing also is regarded as part of *victus.*

44 GAIUS, *Provincial Edict, book 22:* And the other things which we use for protecting and looking after our bodies are covered by the same expression.

45 ULPIAN, *Edict, book 58:* Labeo says that by "*stratus*" every piece of clothing is meant which is put on; for there is no doubt that every cloak or *peristroma* is a piece of clothing which is a covering. So we regard as part of *victus* a piece of clothing which is not necessarily a covering, as part of *stratus* every piece of clothing which is a covering.

46 ULPIAN, *Edict, book 59:* "Pronounced" and "decreed" mean the same; for we regularly describe those who have the right of judicial decision indiscriminately as having pronounced or decreed. We ought to regard as "the wife of the head of the household" a woman who has not lived dishonorably; for her behavior separates and distinguishes a wife of a head of a household from other women. It will make no difference whether she is still married or a widow, freeborn or freed; for neither the state of being married nor birth make a wife of a head of a household but good behavior.

47 PAUL, *Edict, book 56:* The expression "release" has the same effect as payment.

48 GAIUS, *Praetor's Edict, book . . . :* We do not regard as "freed" someone who, although he has been released from his chains, is nonetheless physically restrained; and we do not regard as freed either someone who is under public guard but without chains.

49 ULPIAN, *Edict, book 59:* The designation "goods" can be either natural or prescribed by the civil law. The natural designation of goods derives from the fact that they beatify, that is, they make people happy; to beatify is to benefit. The designation of goods under the civil law consists of those things which form part of our patrimony. One must realize that among our goods must be reckoned not only those things in the case of which we have ownership but also any goods which are held by us in trust or which are superficiary. Among our goods will equally be reckoned also anything which is subject to actions, petitions, or claims; for all these things seem to form part of our goods.

50 ULPIAN, *Edict, book 61:* The designation "daughter-in-law" is to be extended to cover also the wife of a grandson and beyond.

51 GAIUS, *Provincial Edict, book 23:* In the designation "parent" is included not only a father, but also a grandfather and a great-grandfather and so on; likewise, a mother and a grandmother and a great-grandmother.

52 ULPIAN, *Edict, book 61:* In the designation "patron" is included also a female patron.

53 PAUL, *Edict, book 59:* Things have often been placed on the same footing so that something linked is regarded as something separate, and something separate as something linked, and occasionally something dissolved either as something linked or as something separate. For when older writers said, "*adgnatorum gentiliumque,*" they meant them as separate things. But if someone says, "*super pecunia tutelave suae rei,*"

a tutor cannot be granted separately without money; and when we say, "*quod dedi aut donavi*," we mean both together. But when we say, "*quod eum dare facere oportet*," it is sufficient to prove either of them. But when the praetor says, "*si donum munus operas redemerit*," if all of these obligations have been imposed, it is certain that all of them must be fulfilled; and so the subject matter makes it clear that they are regarded as linked. 1. If some of them have been imposed, the rest will not be lacking. 2. There has likewise been uncertainty how those words "*ope consilio*" are to be taken, whether as linked or separate in meaning. But it is nearer the truth as Labeo says to take them as separate because a theft perpetrated with someone's help is different from theft perpetrated with someone's advice; this is why one can be sued by *condictio*, the other not. Of course, following the authority of older writers, the position has been reached that no one is regarded as having done something with someone's help unless that person also had an evil intention; nor is it a crime to have had an evil intention unless action followed.

54 ULPIAN, *Edict, book 62:* Conditional creditors include also those who do not yet have an action but who will have one, or those who possess the hope that they may have one.

55 PAUL, *Edict in Brief, book 16:* A creditor, however, is a person who cannot be set aside by a perpetual exception; someone, however, who has to fear a temporary exception is similar to a conditional creditor.

56 ULPIAN, *Edict, book 62:* "To take cognizance of documents" is to read them and master them; "to balance" is to relate receipts and expenses. 1. In the designation "children" are included not only those who are in power but also all those who are independent, whether they are male or female or descended from a son or daughter.

57 PAUL, *Edict, book 59:* If someone has a special care for something or if people have to display greater diligence and solicitude to others toward the things of which they are in charge, they are called "*magistri.*" Indeed magistracies themselves derive their name from *magistri.* So also teachers in any discipline are called *magistri* from the fact that they inform and explain. Someone who has received security is also held "*persequi.*"

58 GAIUS, *Provincial Edict, book 24:* Although there seems to be a certain subtle difference between "gesta" and "facta," nonetheless, there is improperly no difference between something which is done and something which is carried out. 1. We are rightly regarded as calling the freedmen of our fathers our own freedmen; we do not rightly call the freedmen of our sons our own freedmen.

59 ULPIAN, *Edict, book 68:* A "harbor" is the name of an enclosed space where goods are imported and whence they are exported; and any enclosed and walled-in place may equally have the same name. Whence one talks about *angiportum.*

60 ULPIAN, *Edict, book 69:* A "*locus*" is not an estate but some part of an estate; a "*fundus* [estate]," however, is something complete, and we mostly regard as a *locus* something without a villa; but both in our opinion and by *constitutio* a *locus* is distinct from a *fundus* in such a way that a *locus* can be called a *fundus* if we possess it with the intention of regarding it as a *fundus.* Indeed, it is not size which distinguishes a *locus* from a *fundus* but our intention. And any part of a *fundus* can be called a *fundus* if that is what we have decided. And, furthermore, a *fundus* can be decided to be a *locus* for if we have joined it to the *fundus* of someone else it will be made a *locus* on his *fundus.* 1. The designation of *locus* relates not only to country but also to urban properties according to Labeo. 2. But a *fundus* has its own boundaries, while a *locus* can extend more widely, depending on its determination and definition.

61 PAUL, *Edict, book 65:* In the designation of "*satisdatio*" will also sometimes be contained a repromission with which he to whom *satisdatio* was owed has expressed himself content.

62 GAIUS, *Provincial Edict, book 26:* In the designation of "*tignus*" in the *Law of the Twelve Tables*, every kind of material from which buildings are constructed is included.

63 ULPIAN, *Edict, book 71:* "In your power" has a fuller meaning than "with you." For whatever is held by you in any way is with you; something which is owned in some way is in your power.

64 PAUL, *Edict, book 67:* Not only someone who has not made a will is "intestate" but also someone whose inheritance has not been taken up under his will.

65 ULPIAN, *Edict, book 72:* The designation of "heir" relates not only to the first heir but also to successive heirs; for also the heir of the heir and so on is included in the designation of heir.

66 ULPIAN, *Edict, book 74:* The designation of "merchandise" relates only to movable things.

67 ULPIAN, *Edict, book 76:* Something is not properly described as "alienated" if it remains in the possession of the seller; but it is rightly described as "sold." 1. Speaking plainly, the word "donation" seems to regard every kind of donation whether it has been made in consideration of death or not.

68 ULPIAN, *Edict, book 77:* The words "*arbitratu Lucii Titii fieri*" relate to the law and do not apply in the case of a slave.

69 ULPIAN, *Edict, book 78:* The words "*cui rei dolus malus aberit afuerit*" in general comprehend any kind of deceit which has been perpetrated in an affair in which a stipulation has been interposed.

70 PAUL, *Edict, book 73:* One must realize that an heir can be acquired by many kinds of successions. For under a few headings, the designation of "heir" covers the next heir as in the substitution of someone who has not yet reached manhood with the words "whoever is my heir let him also be the heir to my son" where the heir of the heir is not covered because he is unknown. Likewise, in the *lex Aelia Sentia* the son as next heir can accuse a freedman of his father as undutiful but not if he is the heir of the heir. The same view is taken in demands for services so that son as heir can demand them, but not someone who is an heir as a result of succession. The words "he whom the matter concerns" are understood in such a way that anyone is covered who succeeds into complete ownership either under the civil law or under the praetorian law.

71 ULPIAN, *Edict, book 79:* "*Capere*" is one thing, "*accipere*" is something else. *Capere* is regarded as something which takes effect, *accipere* as something which occurs even if someone has not acquired something to hold it. And so someone is not regarded as obtaining (*capere*) something which he will have to give back; just as something is regarded as having arrived if it is to remain. 1. The words "*his rebus recte praestari*" mean that a stipulator should fear no danger or loss in the matter.

72 PAUL, *Edict, book 76:* In the designation of "thing" the part also is contained.

73 ULPIAN, *Edict, book 80:* The words "*eam rem recte restitui*" occurring in a stipulation include its produce; for the word "*recte*" relates to the judgment of a good man.

74 PAUL, *Curule Aediles' Edict, book 2:* A ring with a seal is not included in the designation of "ornament."

75 PAUL, *Edict, book 50:* Someone is regarded as "restoring" who has restored the thing which he would have had as *actor* if a controversy had not arisen over it.

76 PAUL, *Edict, book 51:* Someone is regarded as "having given" if he exchanged or gave in compensation.

77 PAUL, *Edict, book 49:* Julian writes that "produce" is used to cover not only the case of corn and vegetables but also vines, trees for felling, claypits, and quarries. It is not true that "produce" is everything on which man feeds; for meat and poultry and wild animals and fruit are not produce. However, Gallus was right to define "corn" as that which grows on the ear, but lupins and beans are rather regarded as produce because they do not grow on an ear but in a pod. Servius reported by Alfenus regards these as included under corn.

78 PAUL, *Plautius, book 3:* At times the word "possession" signifies property, as has been laid down in the case of someone who has bequeathed his possessions.

79 PAUL, *Plautius, book 6:* "Necessary expenses" are such that if they had not taken place, the object in question would either have perished or deteriorated. 1. Fulcinius says that "useful expenses" are those which make a dowry better not those which do not allow it to deteriorate, those, that is, as a result of which the woman acquires revenues, as, for instance, the preparation of the soil of a coppice beyond what was necessary or the education of her slaves. It is not right under this heading to impose on a woman who is ignorant or unwilling with the argument that she may lose the benefit of her estate or her slaves. Among these expenses we usually regard a bakery or a granary added to a block of flats which forms a dowry. 2. "Pleasurable expenses" are those which only improve the appearance of something, but do not also increase the income from it, as, for instance, gardens and fountains, wall decorations, pavements, pictures.

80 PAUL, *Plautius, book 9:* In the case of a general revocation of legacies, even liberty which has been granted is included according to the intention of the *Law of the Twelve Tables.*

81 PAUL, *Plautius, book 10:* When the praetor says, "*ut opus factum restituatur,*" a plaintiff must recover any loss involved; for every benefit of a plaintiff is included in the word "restitution."

82 PAUL, *Plautius, book 14:* The word "*amplius*" relates also to someone to whom nothing is owed, just as, on the other hand, something is regarded also as "incompletely" paid if nothing was exacted.

83 JAVOLENUS, *From Plautius, book 5:* Things cannot properly be called "goods" if they involve more disadvantages than benefits.

84 PAUL, *Vitellius, book 2:* In the designation of "son" we understand all children.

85 MARCELLUS, *Digest, book 1:* Neratius Priscus thinks that three make a "*collegium*" and this is rather to be followed.

86 CELSUS, *Digest, book 5:* What else are *jura praediorum* than the qualities of estates, such as fertility, salubriousness, size?

87 MARCELLUS, *Digest, book 12:* As Alfenus said, "*urbs*" means that part of "*Roma*" which was surrounded by the wall, "*Roma,*" however, also covers the neighboring built-up area; for one can see from daily usage that Rome is not regarded as extending only as far as the wall, since we say that we are going to Rome even if we live outside the *urbs.*

88 CELSUS, *Digest, book 18:* Someone leaves only just as much money as can be made up from his goods. Thus, we say that he has a hundred aurei if he has so much in es-

tates and other similar things. The same does not apply in the case of an estate belonging to someone else and forming part of his legacy, although it can be acquired by money forming part of the legacy. Nor does anyone regard a man who possesses coined money as possessing something which can be acquired with it.

89 POMPONIUS, *Sabinus, book 6:* Oxen are designated as being among *armenta* rather than among "*jumenta.*" 1. By the expression "as long as she is married" first marriages are meant. 2. There is a great deal of difference between "*edere*" and "*reddi rationes.*" Nor is someone who has been ordered *edere* obliged to give back what remains; for a banker also is regarded as rendering an account even if he does not pay what remains with him.

90 ULPIAN, *Sabinus, book 27:* He who hands over a house on the terms "*uti optimae maximaeque sunt*" does not say that it possesses any servitude but only that the house itself is unencumbered, that is, that it owes no servitude.

91 PAUL, *Fideicommissa, book 2:* Under the designation "*meorum*" and "*tuorum*" actions also must be regarded as being included.

92 PAUL, *Questions, book 7:* He whom no one precedes is regarded as "coming next;" he whom no one follows is regarded as "coming last."

93 CELSUS, *Digest, book 19:* In the designation "movable" we mean also "mobile," only, however, if it appears that the deceased described animals as moving because they moved themselves. This is right.

94 CELSUS, *Digest, book 20:* The word "restore," although it has the meaning of "give back," acquires also by itself the meaning of give.

95 MARCELLUS, *Digest, book 14:* The designation of "rest" can signify everyone.

96 CELSUS, *Digest, book 25:* The shore covers the area over which the highest tide of the sea reaches, and they say that Marcus Tullius first established this when he was arbitrator. 1. We do not regard estates as belonging to people if they hold them in common, but where each person holds his own.

97 CELSUS, *Digest, book 32:* When we stipulate, "*quanta pecunia ex hereditate Titii ad te pervenerit,*" we are regarded as considering the things themselves and not their prices.

98 CELSUS, *Digest, book 39:* When it is an intercalary day, it does not make any difference whether someone was born on the first or second day, but thereafter his birthday will be the sixth day before the kalends. For those two days are regarded as one day. But it is the later day which is intercalated, not the earlier; so if someone was born on the sixth day before the kalends in a year in which no intercalation took place, when the sixth day before the kalends is intercalated, he has the earlier day as his birthday. 1. Cato thinks that an intercalary month is an additional one, and Quintus Mucius regards all its days as a moment of time and attributes them to the last day of the month of February. 2. But an intercalary month consists of twenty-eight days.

99 ULPIAN, *Duties of Consul, book 1:* We can regard "*notio*" as covering cognition and jurisdiction. 1. We must regard "neighboring provinces" as those which adjoin Italy, as, for instance, Gaul; but we must regard the province of Sicily as rather being among the neighboring ones since it is divided from Italy by a narrow strait. 2. It will be very difficult to distinguish the things which are included in the designation "*instru-*

menta"; [let us consider] those things which are properly *instrumenta* on account of which adjournment is granted, and then let us distinguish. 3. If adjournment is sought with a view to the presence of the person who can instruct, for instance, someone who has carried something out even in slavery or someone who has been established as an *actor*, I should think that the adjournment is sought on the grounds of *instrumenta*.

100 ULPIAN, *Duties of Consul, book 2:* We must regard as "respectable people" those people of both sexes who are *clarissimi*, likewise, those who enjoy senatorial privileges.

101 MODESTINUS, *Distinctions, book 9:* Some people think that there is this difference between "debauchment" and "adultery," that adultery is committed against a married woman, debauchment against a widow, but the *lex Julia* on adultery uses this word indifferently. 1. "Divorce" is regarded as taking place between husband and wife; "repudiation," however, seems to be of a betrothed. This term also is not unreasonably used in the case of a wife. 2. It is right that "disease" is a temporary weakness of the body, "defect," however, a permanent flaw in the body, as, for instance, if someone has broken his ankle; for someone one-eyed is also defective. 3. Some people think that when slaves are bequeathed, female slaves ought to be included since a single name covers both sexes.

102 MODESTINUS, *Rules, book 7:* A law may suffer "derogation" or "abrogation." Derogation affects a law when part is removed, abrogation when it is entirely abolished.

103 MODESTINUS, *Rules, book 8:* Although for those who speak Latin "capital" covers every case where a man's reputation is at stake, nonetheless, the designation capital is to be regarded as covering death or loss of citizenship.

104 MODESTINUS, *Releases, book 2:* The designation of "children" extends also to descendants.

105 MODESTINUS, *Replies, book 11:* Modestinus replied that the freedman of the freedwoman of a testator is not included in the words "to my male and female freedmen."

106 MODESTINUS, *Prescriptions, sole book:* "*Dimissoriae litterae*" are those which are commonly called *apostoli*. They are called *dimissoriae* because the case is dismissed for the person who was cited.

107 MODESTINUS, *Encyclopaedia, book 3:* "To assign a freedman" is to testify to which son a man wished that freedman to belong.

108 MODESTINUS, *Encyclopaedia, book 4:* "Debtor" is understood to mean someone from whom money can be exacted against his will.

109 MODESTINUS, *Encyclopaedia, book 5:* "A purchaser in good faith" seems to be someone who did not know that the thing belonged to someone else or thought that the seller had the right to sell, for instance, a procurator or tutor.

110 MODESTINUS, *Encyclopaedia, book 6:* A "*sequester*" describes someone with whom several people deposited the thing which is the subject of controversy; he is so called from the fact that the thing is committed to someone who meets or, as it were, follows (*sequor*) those who are at odds.

111 JAVOLENUS, *From Cassius, book 6:* "*Censere*" is to establish and ordain, whence also we are used to saying "*censeo* (I ordain) that you do this" and "to have established something for oneself." The name of censor seems to be drawn from this usage.

112 JAVOLENUS, *From Cassius, book 11:* The public shore extends as far as the waves reach at their furthest point; and the same legal position exists in respect of a lake, unless it is wholly private.

113 JAVOLENUS, *From Cassius, book 14:* "A disabling disease" is one which damages something.

114 JAVOLENUS, *From Cassius, book 15:* No one is regarded as solvent unless he can pay everything.

115 JAVOLENUS, *Letters, book 4:* The question arises, what distinguishes a *fundus* from a possession or a field or an estate. A "*fundus*" is anything which consists of land. A "field" exists if a kind of *fundus* is prepared for human use. A "possession" differs from a field by reason of law; for whatever we take, if its ownership does not pertain or cannot pertain to us, we call it a possession. So possession is use, a field the ownership of a place. An "estate" is the general name of either of the aforementioned things; for both field and possession are types of this kind of designation.

116 JAVOLENUS, *Letters, book 7:* In "whatever other son or son of a son be my heir," Labeo thinks a daughter is not covered, Proculus the opposite. Labeo seems to me to be paying attention to the literal meaning of the words, Proculus to the intention of the testator. His reply is: "I do not doubt that Labeo's opinion is wrong."

117 JAVOLENUS, *Letters, book 9:* A man against whom an action for a larger sum does not lie can not be regarded as "paying in part."

118 POMPONIUS, *Quintus Mucius, book 2:* "Enemies" are those who have publicly declared war on us or on whom we have publicly declared war; others are "brigands" or "pirates."

119 POMPONIUS, *Quintus Mucius, book 3:* The designation "inheritance" certainly includes also an inheritance which is a liability; for it is a legal category like *bonorum possessio.*

120 POMPONIUS, *Quintus Mucius, book 5:* In these words of the *Law of the Twelve Tables, "uti legassit suae rei, ita jus esto,"* the widest possible power seems to be conferred of naming an heir and granting legacies and establishing tutelages; but this has been narrowed by interpretation or the authority of laws or those who establish law.

121 POMPONIUS, *Quintus Mucius, book 6:* The interest which we receive on money is not in the category of produce, because it does not arise by a process of reproduction, but for a different reason, that is, a new obligation.

122 POMPONIUS, *Quintus Mucius, book 8:* Servius says that if one writes, "I assign these tutors to my son or sons," the tutors are assigned only to male issue, since one seems to have moved from the singular case "*filio*" to the related plural of the same gender as the earlier singular had. But this is a question of fact, not of law; for it can happen that someone used the singular case of a son and then wished in assigning a tutor to have provided more fully for all one's children. This seems to be more reasonable.

123 POMPONIUS, *Quintus Mucius, book 26:* The words "will be" sometimes indicate the past and not only the future. Thus, it is necessary for us to know, especially when codicils have been confirmed in a will in these words "whatever shall be written in any codicils," whether the authentication relates to the future or also to the past, if anyone leaves codicils written earlier. This is to be interpreted according to the will of the author. But just as the word "is" refers not only to the present but also to the past, so the words "will be" refer not only to the future but also sometimes to the past. For when we say, "Lucius Titius is released from his obligations," we refer to both the present and the past, so also with "Lucius Titius is bound"; and the same is true if we

say, "Troy is fallen"; for this expression does not relate to a present fact, but to the past.

124 PROCULUS, *Letters, book 2:* The words "one or another" are not only disjunctive but also belong to subdisjunctive speech. Disjunction is if we say, "it is night or day," where if one is true, the other is not. So in a similar construction, a word can be subdisjunctive. But there are two kinds of subdisjunctive, one when of two possible conclusions, both cannot be true and neither need be true, as when we say, "either he is seated or he is walking"; for just as no one can be doing both at the same time, so someone can be doing neither, for instance, someone who is lying down. The other kind of subdisjunctive is involved when of the possible conclusions one must be true and both can be true, as when we say, "every living thing either suffers action or acts"; for there is none which does neither the one nor the other, and one can do both at the same time.

125 PROCULUS, *Letters, book 5:* Nepos sends greetings to his friend Proculus. Do you think that once a marriage has taken place, a dowry can be claimed from someone who promised a dowry in these words, "when it is convenient, you will have a hundred aurei as the dowry for my daughter?" What if he promised in these words: "You will have the dowry, when I can pay it?" For if a later obligation has any force, how do you interpret the words "be able," after the deduction of money owed or not? Proculus replied: "When someone has promised a dowry in the words, 'when I can pay it, you will have a dowry of a hundred [aurei],'" I think that the interpretation must be formulated in terms of what has been transacted. For someone who speaks ambiguously says what he declared with the words which were expressed. But it is more likely that I should think that he declared: "I shall be able to pay after the deduction of money owed." But it is also possible to understand the meaning: "I shall be able to pay, provided my standing is unaffected." This interpretation is the more acceptable if he has promised in these words, "when it is convenient," that is, "when I shall be able to pay without inconvenience to myself."

126 PROCULUS, *Letters, book 6:* If, when I gave you a *fundus*, I imposed a condition in these words, "provided that it remained undiminished and undamaged," and added, "it shall be established that the state of the *fundus* has not been worsened by its [current] owner," nothing else shall be established, even if the earlier part of the conditions, in which it was written, "provided that it remains undiminished and undamaged," means that it is unencumbered, and if the later part had not been added, I should have to furnish it unencumbered. Rather, I regard myself as sufficiently freed by the later part, as far as concerns the law, so that I should not have to establish anything else except that the state of the *fundus* has not been worsened by its [current] owner.

127 CALLISTRATUS, *Judicial Examinations, book 4:* In the designation "clothing" male, female and theatrical, whether tragic or citharoedic, are included.

128 ULPIAN, *Lex Julia et Papia, book 1:* The name of eunuch is a general one; under it come those who are eunuchs by nature, those who are made eunuchs, and any other kind of eunuchs.

129 PAUL, *Lex Julia et Papia, book 1:* Those who are stillborn, seem neither born nor begotten, since they could never be called children.

130 ULPIAN, *Lex Julia et Papia, book 2:* One will not wrongly have said that an inheritance has fallen to someone also in the case of one which is given by will, since testamentary inheritances are confirmed in the *Law of the Twelve Tables.*

131 ULPIAN, *Lex Julia et Papia, book 3:* "Fraud" is one thing, "penalty" another; for there can be fraud without a penalty, but not a penalty without fraud. A penalty is retribution for a delict, the delict itself is called fraud and is, as it were, a preparation for a penalty. 1. But there is a considerable difference between a "fine" and a "penalty," since a penalty is a general name for the punishment of all delicts, a fine is tied to

a misdemeanor, whose punishment is today in monetary form. But a penalty is not only of monetary form, but may be capital or involve status. And, indeed, a fine arises from the judgment of a man who pronounces the fine. A penalty is not imposed, except that which is laid down specially for the delict in question by each law or some other provision. So a fine is pronounced in cases where a special penalty is not laid down. Likewise, a man who possesses jurisdiction can pronounce a fine. It is laid down in mandates that only magistrates and governors of provinces can pronounce fines. But anyone to whom the prosecution of the offense or delict in question falls can impose a penalty.

132 PAUL, *Lex Julia et Papia, book 3:* Someone dies a "yearling" who dies on the last day of the year. And customary speech makes this clear; for neither by "ten days before the Kalends" nor by "ten days after the Kalends" is eleven days meant. 1. One cannot say that a woman from whose corpse a son was taken by surgery has given birth.

133 ULPIAN, *Lex Julia et Papia, book 4:* If someone said, "provided something happens before the day of his death," the actual day on which someone died counts.

134 PAUL, *Lex Julia et Papia, book 2:* Someone is not called "yearling" as soon as he is born, but on the three hundred sixty-fifth day, clearly when the day begins, not when it finishes, since in the civil law we do not reckon the year by moments of time, but by days.

135 ULPIAN, *Lex Julia et Papia, book 4:* Someone will ask, if a woman has given birth to someone unnatural, monstrous or weak or something which in appearance or voice is unprecedented, not of human appearance, but some other offspring of an animal rather than of a man, whether she should benefit, since she gave birth. And it is better that even a case like this should benefit the parents; for there are no grounds for penalizing them because they observed such statutes as they could, nor should loss be forced on the mother because things turned out ill.

136 ULPIAN, *Lex Julia et Papia, book 5:* It is clear that in the designation "son-in-law" are included the husbands of a granddaughter and a great-granddaughter, whether descended from a son or a daughter, and so on.

137 PAUL, *Lex Julia et Papia, book 2:* "Three times a mother" includes also someone who has borne triplets.

138 PAUL, *Lex Julia et Papia, book 4: Bonorum possessio* also is included in the designation "inheritance."

139 ULPIAN, *Lex Julia et Papia, book 7:* Buildings "at Rome" include also those which are among buildings adjacent to Rome. 1. A man is regarded as having "completed" a building if he has brought it so far that it can now be used.

140 PAUL, *Lex Julia et Papia, book 6:* Someone is regarded as having "received" something, even if he has acquired it for someone else.

141 ULPIAN, *Lex Julia et Papia, book 8:* A woman is even regarded as having a son when she died, if she could produce it by having it taken from her womb by surgery. And a woman can also have a son in another way without having him at the moment of her death, for instance, if he later returns from the enemy.

142 PAUL, *Lex Julia et Papia, book 6:* Conjunction has three meanings; for conjunction occurs by means of the affair by itself or by means of the affair and verbally or verbally alone; nor is there any doubt about the conjunction of people whom the association of names and the affair in question joins, as with "let Titius and Maevius be heirs to half

each" or "let Titius and Maevius be heirs" or "let Titius with Maevius be heirs to half each." Let us see, however, whether, even if you remove these conjunctions, "and" or "with," nonetheless, it is right for them to be regarded as joined, as with "let Lucius Titius, Publius Maevius be heirs to half each" or "let Publius Maevius, Lucius Titius be heirs." "Let Sempronius be heir to half" in such a way that Titius and Maevius may come into half and seem joined by means of the affair itself and verbally. "Let Lucius Titius be heir to half. Let Seius be heir to the half for which I have made Lucius Titius heir. Let Sempronius be heir to half." Julian held that it was doubtful whether three halves had been created or whether Titius had been made heir for the same half as Gaius Seius; but because Sempronius is also recorded as heir to a half, it is more reasonable that two halves had been treated as one and that they were recorded as joint heirs.

143 ULPIAN, *Lex Julia et Papia, book 9:* Someone is regarded as "holding" something "with him" if he has an action over it; for something which can be claimed is held.

144 PAUL, *Lex Julia et Papia, book 10:* Massurius writes in his book of memoirs that among earlier generations a "*pellex*" was regarded as someone who lived with someone even if she was not his wife; whom now one calls by the true name of friend or the slightly more honorable one of concubine. Granius Flaccus writes in his book about the *jus Papirianum* that a *pellex* is now the usual name for someone who sleeps with someone who has a wife, but once upon a time someone who was in a household in place of a wife, but without being married, whom the Greeks call *pallake*.

145 ULPIAN, *Lex Julia et Papia, book 10:* One must say that in the designation "man's share" sometimes the entire inheritance is also included.

146 TERENTIUS CLEMENS, *Lex Julia et Papia, book 2:* One replies that in the designation "father-in-law," "mother-in-law," the grandfather and grandmother of husband or wife are also included.

147 TERENTIUS CLEMENS, *Lex Julia et Papia, book 3:* Those who are born in areas adjacent to the city are regarded as born "at Rome."

148 GAIUS, *Lex Julia et Papia, book 8:* Someone who has one son or one daughter is not childless; for the formula "he has children," "he does not have children" is always used with the plural, as also writing tablets or codicils.

149 GAIUS, *Lex Julia et Papia, book 10:* For someone whom we cannot describe as being childless, we must describe as having children.

150 GAIUS, *Lex Julia et Papia, book 9:* If you have stipulated with me in these words, "do you promise to give me as much as I have failed to get from Titius," there is no doubt but that if I have got nothing from Titius, you owe the whole of what Titius owed.

151 TERENTIUS CLEMENS, *Lex Julia et Papia, book 5:* An inheritance is regarded as "offered" if someone can acquire it by going to it.

152 GAIUS, *Lex Julia et Papia, book 10:* There is no doubt that female as well as male is included in the designation "man."

153 TERENTIUS CLEMENS, *Lex Julia et Papia, book 11:* Someone who was left in the womb must be regarded as having existed at the time of death.

154 MACER, *The Inheritance Tax Law, book 1:* The mile distance is to be counted not from the milestone in the city, but from the adjacent buildings.

155 LICINNIUS RUFINUS, *Rules, book 7:* Someone who is by himself is also regarded as included in the designation "next."

156 LICINNIUS RUFINUS, *Rules, book 10:* Someone is regarded as having possessed

something "for the greater part of the year" even if he only possessed it for two months, if his adversary possessed it for fewer days or for none at all.

157 AELIUS GALLUS, *The Meaning of Expressions Which Relate to the Law, book 1:* Something is a "wall" whether it is of bricks or rubble. 1. Likewise, something is a "way" whether it is a path or a road.

158 CELSUS, *Digest, book 25:* In the practice of the law, Cascellius says that we often use the singular case, when we mean to signify several of the same kind; for we say that "many a man has come to Rome" or that "fish is cheap." Likewise, in stipulating it is enough if we provide over the heir "if this affair is judged according to the case of myself or my heir" or again "whatever . . . yourself or your heir on account of this affair"; for even if there are several heirs, they are included in the stipulation.

159 ULPIAN, *Sabinus, book 1:* We even call gold coinage "*aes*."

160 ULPIAN, *Sabinus, book 2:* In the designation "other" and "remaining," we also include everyone, as Marcellus said concerning the man to whom an option of a slave was bequeathed, while the option on the rest was left to Sempronius; for he wishes, if he does not opt, for everything to go to Sempronius.

161 ULPIAN, *Sabinus, book 7:* Someone still in the womb is not a "ward."

162 POMPONIUS, *Sabinus, book 2:* In ordinary substitution in which an heir is substituted for the man who dies "last," someone is rightly substituted even for a single predecessor, on the analogy of the *Twelve Tables*, under which the "nearest" agnate is regarded as including the only agnate. 1. So if someone included a clause in his will in these words, "if anything happens to my son, let my slave Dama be free," if the son dies, Dama will be free. For although things "happen" to the living, nonetheless, in common parlance one means death.

163 PAUL, *Sabinus, book 2:* The words "best and greatest" can refer to an estate which is a single entity. Thus also in relation to the praetorian edict a "last tablet" may also be the only one. 1. In the designation "boy" a girl is also included; for they also call women who have recently given birth women in childbirth and in Greek the young are called uniformly *paidion*.

164 ULPIAN, *Sabinus, book 15:* There is no question but that the name of "daughter" can belong to one born posthumously, although it is certain that the name of "posthumous" cannot belong to one who is already born. 1. The designation "division" does not always mean halving, but as the specification lays down; for someone can be ordered to divide off the largest part, or a twentieth or a third as is decided. But if the amount is not specified, a half must be transferred. 2. "To hold" is to be understood as involving effective transfer.

165 POMPONIUS, *Sabinus, book 5:* Nothing is regarded as having come to an heir unless liabilities have already been met.

166 POMPONIUS, *Sabinus, book 6:* "An urban slave household" and "a rural slave household" are distinguished not by kind but by place for a *dispensator* can be elsewhere than among urban slaves, as, for instance, one who looks after the accounts of a rural enterprise and lives there. The man in charge of a block of flats is not very different from a bailiff, but he lives among urban slaves. However, one must consider whom the master himself had and in place of whom and this will be apparent from the size of the household and from the deputies in it. 1. "To spend a night outside the city" is to be understood as relating to someone who is in the city for no part of the night; the word "*per*" means the whole night.

167 ULPIAN, *Sabinus, book 25:* In the designation "charcoal," the raw material is not included; but what about "wood?" Perhaps someone will say that it is not even included in wood; for [the testator] did not so regard it. But are we to regard firebrands and other wood that has been passed through a furnace so that it will not produce smoke as wood or charcoal or as a separate entity? It is better to regard it as belonging to a separate entity. Sulphurated wood will also be distinct from wood in the same way.

And wood prepared in order to be used as a torch will not be included in the designation wood unless this was the intention. And the same is true of olive stones and also of acorns and of any other such fruits. As far as pine is concerned, however, complete pine cones will be included in the designation "wood."

168 PAUL, *Sabinus, book 4:* Rods and staves are to be regarded as belonging to the category of raw material and so are not included in the designation "wood."

169 PAUL, *Sabinus, book 5:* The clause "*uti optimus maximusque est*" not only in deliveries but also in sales and stipulations and wills means that the estate is handed over unencumbered, not that servitudes are also due to it.

170 ULPIAN, *Sabinus, book 33:* In the designation "heir," it must be accepted that all successors are included even though they are not expressly mentioned.

171 POMPONIUS, *Sabinus, book 16:* One rightly says: "that something has come to you," even if it has come to another through you, as the reply lays down in the case of an inheritance acquired by a freedman for his adopted father through the son-in-power as patron.

172 ULPIAN, *Sabinus, book 38:* It was decided that in the designation "freedman," freedwoman is also included.

173 ULPIAN, *Sabinus, book 39:* In the designation "colleagues," those are included who possess the same power. 1. Anyone who is away from the area of the city "is absent"; but within the area he will not be absent.

174 ULPIAN, *Sabinus, book 42:* It is one thing to undertake "that someone is not a thief," another "that someone is untainted by theft or crime"; for someone who says that someone is not a thief is talking about the nature of the man, someone who says that he is untainted by theft or crime is undertaking that he is not liable to be prosecuted by anyone for theft.

175 POMPONIUS, *Sabinus, book 22:* The case of restoring is included also in the designation "doing."

176 ULPIAN, *Sabinus, book 45:* In the designation "settlement," it has been decided that every kind of satisfaction must be included. We say that someone who has done what he promised to do "settles."

177 ULPIAN, *Sabinus, book 47:* The nature of a cavil, which the Greeks called *sorites* is this, that the argument leads by short steps from what is evidently true to what is evidently false.

178 ULPIAN, *Sabinus, book 49:* The designation "money" does not only include coinage but absolutely every kind of money, that is, every substance; for there is no one who doubts that substances are also included in the designation of money. 1. "Inheritance" is a legal designation which includes in itself accession and diminution; but an inheritance is increased as much as possible by produce. 2. The word "action" is both specific and general; for everything is called an action whether it is a claim *in rem* or one *in personam*; but for the most part we are accustomed to call those things actions which are *in personam*. But actions *in rem* seem to be meant by the word "petition." I think that by the word "prosecution" extraordinary prosecutions are meant, as, for instance, in the case of *fideicommissa* and anything else which does not have a procedure under ordinary law. 3. The words "it was necessary" are understood as covering every action of every kind, whether civil or under the *jus honorarium* or a claim in respect of a *fideicommissum*.

179 ULPIAN, *Sabinus, book 51:* There is no difference between the words "whatever it is worth" and "whatever it appears to be worth"; for it has been decided that in the case of either clause a true valuation of the object takes place.

180 POMPONIUS, *Sabinus, book 30:* In the designation "hut," every building which is more fitting for rural protection than for urban housing is meant. Ofilius says that a hut (*tugurium*) is named from its tiled roof (*tegularium*), just as a toga is named because we are covered by it.

181 POMPONIUS, *Sabinus, book 35:* The words "to pertain" have the widest possible meaning; for it is suited to the attempt to gain control of those things which belong to us and of those things which we possess by some other right even though they do not belong to us; for we say that those things pertain to us which belong to neither of these two categories but might belong.

182 ULPIAN, *Edict, book 27:* The head of the household who is free cannot have a *peculium* just as a slave cannot have "property."

183 ULPIAN, *Edict, book 28:* The designation "house" covers every building fit for habitation, because it is closed by doors.

184 PAUL, *Edict, book 30:* As a result we talk of tabernacles and *contubernales*.

185 ULPIAN, *Edict, book 28:* However, we regard a house as "equipped" which possesses wares and men ready for doing business.

186 ULPIAN, *Edict, book 30:* "To entrust one's charge" is nothing other than to deposit.

187 ULPIAN, *Edict, book 32:* The designation "money exacted" is to be referred not only to settlements but also to delegation.

188 PAUL, *Edict, book 33:* "To hold" is used in two ways, one under the law of ownership, the other if one obtains what one has bought without appealing to a court. 1. "Surety" is used whether the guarantee is personal or in property.

189 PAUL, *Edict, book 34:* "To have to do" has this meaning also that someone must abstain from doing what would be contrary to an agreement and must see that this does not take place.

190 ULPIAN, *Edict, book 34:* We must regard those as "provincials" who have their domicile in a province, not those who originate from a province.

191 PAUL, *Edict, book 35:* There is this difference between "divorce" and "repudiation" that even a future marriage can be repudiated; but a betrothed woman is not rightly described as being divorced, because divorce is derived from the fact that those who separate go in diverse directions.

192 ULPIAN, *Edict, book 37:* The clause "or for a larger sum" does not cover an infinite sum of money but a small amount just as the assessment "for ten solidi or for a larger sum" refers to a very small amount.

193 ULPIAN, *Edict, book 38:* The words "whatever it appears to be worth" do not refer to the party's interest but to the valuation of the object.

194 ULPIAN, *Edict, book 43:* There is the same difference between "gift" and "offering" as between genus and species for Labeo says that the genus of gift is named from giving and offering is a species; for an offering is a gift with a reason, as, for instance, for a birthday or a wedding.

195 ULPIAN, *Edict, book 46:* The use of a word in the masculine gender is usually extended to cover both genders. 1. Let us consider how the designation of "household" is understood. And indeed it is understood in various ways; for it relates both to things and to persons: to things, as, for instance, in the *Law of the Twelve Tables* in the words "let the nearest agnate have the household." The designation of household, however, refers to persons when the law speaks of patron and freedman: "from that household" or "to that household"; and here it is agreed that the law is talking of individual persons. 2. The designation of households relates also to any kind of body which is

covered by a legal status peculiar to its members or common to an entire related group. We talk of several persons as a household under a peculiar legal status if they are naturally or legally subjected to the power of a single person as in the case of a head of a household, the wife of a head of a household, a son-in-power, a daughter-in-power, and those who thereafter follow them in turn, as, for instance, grandsons and granddaughters, and so on. Someone is called the head of a household if he holds sway in a house, and he is rightly called by this name even if he does not have a son; for we do not only mean his person but also a legal status; indeed, we can even call a *pupillus* a head of a household. And when the head of a household dies, all the individuals who were subjected to him begin to hold their own households for as individuals they enter into the category of heads of households. And the same will occur in the case of someone who is emancipated; for when he has been made independent he has his own household. We describe a household consisting of all the agnates under a single legal rule for even if all of them have their own families after the head of the household has died, nonetheless, all of them who were under the power of a single person will rightly be described as belonging to the same household, since they belong to the same house and family. 3. We are also accustomed to describe slaves as forming a household, as we can show in the praetorian edict under the title on theft where the praetor talks about a household belonging to publicans. But there all slaves are not meant but a certain body of slaves collected for one purpose, namely in order to collect taxes. But in another part of the edict, all slaves are included as in the part dealing with gangs of men or force used to sieze property or in the action for recovery if something is returned damaged by the activity of the purchaser or his household and in the interdict on the use of force the designation of household covers all slaves. And, indeed, sons are also covered. 4. Likewise, the name of household is also used for several people who descend by blood from the same original founder, as we talk of the Julian household, going back as it were to the origin of records. 5. A woman, however, is both the beginning and end of her household.

196 GAIUS, *Provincial Edict, book 16:* In the designation "household," the head of the household is also included. It is clear that the children of women are not in their household because those who are born join the household of the father.

197 ULPIAN, *Edict, book 50:* "To have informed" is to have brought a case; "to have convicted" is to have brought a successful accusation.

198 ULPIAN, *All Seats of Judgment, book 2:* We regard as "urban estates" all buildings, not only those which are in towns but also any enclosures or other services which there may be in villas and in villages, or if there are residences which serve only for pleasure; for it is not the position which creates an urban estate but its nature. So it must be said that gardens also, if there are any among buildings, are included in the designation "urban." Clearly, if the gardens are for the most part productive, as, for instance, vineyards or vegetable patches, these are for the most part not urban.

199 ULPIAN, *All Seats of Judgment, book 8:* We must regard as "absent" someone who is not in the place in which he is sought, for we do not miss as absent someone who is overseas. And if by chance someone is outside the area of the city he is absent, but he will not seem to be absent within the area of the city provided he is not hiding. 1. Someone who has been captured by the enemy is regarded as not being absent, but someone in the hands of robbers is.

200 JULIAN, *Digest, book 2:* This stipulation "to be handed over untainted by any penal liability" is not regarded as being related to those crimes which are publicly prosecuted and involved in capital penalty.

201 JULIAN, *Digest, book 81:* It must be accepted according to the correct interpretation that in the designation "son" a grandson is also included, just as we have often replied that a daughter-in-power is included, and likewise that in the name of "father" a grandfather is understood as being covered.

202 ALFENUS VARUS, *Digest, book 2:* If it is written in a will that an heir must expend "at least a hundred aurei" on the funeral or the tombstone, it is not legal to expend less; if he wishes to expend more, it is legal, nor will he seem to be disobeying the will as a result.

203 ALFENUS VARUS, *Digest, book 7:* The following clause was included in the censorian law for the harbor tax of Sicily: "No one is obliged to pay harbor tax on those slaves which he is taking home for his own use." The question arose whether someone who was sending slaves from Sicily to Rome in order to staff an estate had to pay harbor tax on these men or not. The reply is that there are two questions in this case: the first what "to take home" is; the second what "to take for his own use" is. So the question usually arises whether so long as someone is in his own *patria* it is rightly called his home, if it is wherever he lives whether in a province or in Italy. But in this matter it was decided that the home of each one of us must be regarded as being where one has one's residence and keeps one's accounts and organizes one's affairs. But what "for his own use" is involves great uncertainty; and it is better to suppose that the phrase only covers what has been acquired in order to support life. And so on this basis the question arises over the slaves which of them were required for the man's own use, whether they were *dispensatores*, men in charge of blocks of flats, bailiffs, doorkeepers, weavers, rural laborers who were owned in order to cultivate the fields from which the head of the household derived revenue—which of these the man had bought in order to have them himself and use them for something, and whether he had not bought any of them in order to sell them. And it appeared that a head of a household had for his own use only those who were charged with looking after his own body and his care and were intended for these purposes; and that in this category masseurs, bedroom attendants, cooks, personal servants, and others who were required for this sort of purposes were included.

204 PAUL, *Epitome of Alfenus, book 2:* The designation "boy" has three meanings: one when we call all slaves boys, another when we talk of a boy in contrast to a girl, and a third when we indicate the age of childhood.

205 PAUL, *Epitome of Alfenus, book 4:* Someone who has sold an estate receives "the fruit"; nuts and figs and grapes, as long as they are hard and purple and are of the kind which we do not have to make wine which the Greeks call *troximoi*, are regarded as having been received.

206 JULIAN, *Minicius, book 6:* It is accepted that "wine" receptacles are properly speaking receptacles for must; *dolia*, however, and *seriae* are only in the same category as long as they contain wine, and when they cease to contain wine, they are not in that category since they can be transferred to another use, for instance, if corn is put in them. The position of amphorae is the same, so that when they contain wine, they are regarded as being wine receptacles; when they are empty, they are not in the category of wine receptacles since other things can be put in them.

207 AFRICANUS, *Questions, book 3:* Mela says that men are not included in the designation "objects of trade"; and as a result he says that slave dealers are not called traders but salesmen, and rightly.

208 AFRICANUS, *Questions, book 4:* The designation "property," like inheritance, covers something in its entirety like the right of succession and not single things.

209 FLORENTINUS, *Institutions, book 10:* Someone ordered to do something "in the presence of Titius" is not regarded as having done it in his presence unless he was aware of the fact; and so if he was mad, an infant, or asleep, he is not regarded as having done it in his presence. However, he needs to know, not also to have approved; for what has been ordered may properly take place against his will.

210 MARCIAN, *Institutions, book 7:* Someone who is born from urban slaves and sent to a villa to be brought up is regarded as belonging to the urban slaves.

211 FLORENTINUS, *Institutions, book 8:* In the designation "estate," every building and field is included. But in common parlance urban buildings are called "*aedes*," rural buildings "villas." But a place without a building in the city is called an "area," in the country, however, a "field." And similarly, a field with a building is called an "estate."

212 ULPIAN, *Adulteries, book 1:* We describe as "prevaricators" those who give away their case to their adversaries and move from the part of a prosecutor to that of a defendant; for prevaricators are named from the variation in their parts.

213 ULPIAN, *Rules, book 1:* "*Cedere diem*" means that money begins to be owed; "*venire diem*" means that the day has arrived on which the money can be claimed. When someone has made a pure stipulation, both these things occur simultaneously. When he has stipulated for a particular day, the first occurs but not the second; where he has stipulated under a condition, neither occurs since the condition is still unfulfilled. "*Aes alienum*" is what we owe to other people; "*aes suum*" is what other people owe to us. "*Lata culpa*" is gross negligence, that is, not to realize what everyone realizes.

214 MARCIAN, *Criminal Proceedings, book 1:* Properly speaking, a "*munus*" is what we are forced to undertake by law or custom or the command of someone who has the right to command. "Gifts," however, are properly speaking those things which are offered under no legal necessity out of a sense of duty and from choice; and if they are not offered, no censure is involved; and if they are offered, it is very praiseworthy. But to sum up, we have reached a position where not every *munus* is regarded also as a gift, but any gift is rightly called a *munus*.

215 PAUL, *Lex Fufia Caninia, sole book:* The word "*potestas*" has many meanings; in the person of magistrates it means *imperium*; in the person of children it means parental power; in the person of a slave it means ownership. But when we are dealing over noxal surrender with someone who does not defend his slave, we mean the capacity and ability to hand over an actual body. In the *lex Atinia*, according to Sabinus and Cassius, something stolen seems to have come into the *potestas* of its owner if he has acquired the *potestas* of claiming it by *vindicatio*.

216 ULPIAN, *Lex Aelia Sentia, book 1:* It is right to suppose that someone who is shut up in prison is neither "bound" nor "in chains" unless chains are actually applied to his body.

217 JAVOLENUS, *From the Posthumous Works of Labeo, book 1:* There is a great difference between the condition "when he can speak" and "after he can speak"; for it is clear that the latter clause is wider; "when he can speak" is narrower and refers only to that time when he can first speak. 1. Likewise, when the condition is imposed "let him do that in more than one day," if there is no additional clause, he must fulfill the condition within two days.

218 PAPINIAN, *Questions, book 27:* The words "to do" cover absolutely every kind of doing, giving, settling, counting, judging, walking.

219 PAPINIAN, *Replies, book 2:* It was decided that in agreements between contracting parties intention rather than the actual words must be considered. So when a community rents out a revenue producing estate on condition that it may go to the heir of the

man who took it, the right of heirs may be transferred also to a legatee.

220 CALLISTRATUS, *Questions, book 2:* In the designation "children," grandsons and great-grandsons and others who are descended from them are included; for the *Law of the Twelve Tables* includes all of these in the designation of relatives. For the laws regard it as necessary to use the name of individual relationships (such as son, grandson, great-grandson, and the others who are descended from them) whenever they wish something to be provided not for everyone who comes after them but provide assistance only for those whom they list by name. But when something is provided not for specified persons or for certain degrees but for everyone who belongs to the same family they are included in the designation children. 1. But Papirius Fronto says in the third book of his *Replies* that if an estate with a bailiff and his associate is left to someone's sons, grandsons born from those sons are also included unless the intention of the testator was otherwise; for there are all sorts of reasons for grandsons often being included in the designation son. 2. The deified Marcus also issued a rescript to the effect that someone who left his grandson as his heir was not regarded as dying without children. 3. Besides all this nature also teaches us that pious parents who marry wives with the hope and intention of having children include in the designation of son all those who descend from us; for we cannot call our grandsons by a sweeter name than that of son. For we have sons and daughters and beget them in order that by the continuation of their offspring we may leave a permanent record of ourselves.

221 PAUL, *Replies, book 10:* Paul replies that one rightly describes as a false tutor someone who is not a tutor, whether he has been given to someone or not, just as a false will includes something which is not a will and a false measure something which is not a measure.

222 HERMOGENIAN, *Epitome of Law, book 2:* In the designation of "money" is included not only coinage but everything whether immobile or mobile and whether it is an object or a claim.

223 PAUL, *Views, book 2:* The definition of *lata culpa* is not to realize what everyone realizes. 1. We ought to describe as "friends" not those who are joined to us by slight acquaintance but those who have bonds of familiarity with the head of the household acquired by honest means.

224 VENULEIUS, *Stipulations, book 7:* In the designation of "chains," they mean private or public chains, but in that of "custody," only public custody.

225 TRYPHONINUS, *Disputations, book 1:* Someone is not described as a "fugitive slave" if he only planned to escape from his master, even if he boasted that he would do it, but only someone who carried the beginning beyond planning by the actual fact of flight. For although someone could call someone a thief, adulterer, or gambler at least in part meaningfully, simply on the basis of the person's mental state, so that even someone who never took something that did not belong to him against the wishes of its owner and never corrupted the wife of another head of a household, provided that he possessed the intention to do the act if the occasion offered [could be so called], nonetheless, one must realize that these offenses only occur when these acts have been perpetrated. And so it is agreed that someone is only called a fugitive slave or vagrant if he has done something and not if he merely has the intention.

226 PAUL, *Handbook, book 1:* Gross negligence is fault; gross fault is bad faith.

227 PAUL, *Handbook, book 2:* By that part of the edict "*tum quem ei heredem esse oportet,*" *bonorum possessio* is not conferred on the heirs of the heir. Likewise, in substitu-

tion in these terms "*quisquis mihi heres erit*," only the next heir is meant, indeed, not only the next heir but actually the heir who is designated.

228 PAUL, *Judicial Examinations, sole book:* "*Municipes*" must be understood as those who are born in the same community.

229 PAUL, *Tacit Fideicommissa, sole book:* We must understand "dealt with and finished" not only in relation to those things where there was controversy but also in cases where possession has been established without controversy,

230 PAUL, *Senatus Consultum Orfitianum, sole book:* for instance, where things are settled by a court, agreed by negotiation, or established by longstanding tacit agreement.

231 PAUL, *Senatus Consultum Tertullianum, sole book:* When we say that someone whose birth is hoped for is treated as if he were in existence, this is correct, when the question of his legal position arises; for he is no use to others unless he is born.

232 GAIUS, *Verbal Obligations, book 1:* This formula "which is worth more than thirty aurei" refers both to quantity and to value.

233 GAIUS, *XII Tables, book 1:* The phrase "*si calvitur*" relates to someone who delays and causes obstruction. This is the origin of the name calumnifiers because they trouble others with law suits by fraud and obstruction; this is also the origin of the term cavil. 1. Vows are offered for the health of the emperor on the third day after the Kalends of January. 2. Something is commonly called a "*telum*" if it is shot from a bow; but everything which is thrown by hand is equally meant; and so it follows that a stone and a stick and an iron object are covered by this term; and the name derives from the fact that the object is propelled a long way, being formed from the Greek term *apo tou telou*. And we can find this meaning also in the Greek word, for what we call *telum* they call *belos* from the Greek word for to throw. Xenophon informs us of this; for he writes: "And the weapons were brought together, spears and bows and slings and likewise very many stones." And what is shot from a bow is called among the Greeks by a special name *toxeuma*; but we use the general word *telum*.

234 GAIUS, *XII Tables, book 2:* Those whom we call "enemies," men of old call "*perduelles*," showing by that preposition with whom they were at war. 1. Someone is "rich" who is sufficiently well off in relation to the size of the thing the restitution of which the plaintiff seeks. 2. Some people think that the words "to be alive" relate also to food, but Ofilius in a letter to Atticus says that in these words both clothes and are included; for no one can live without them.

235 GAIUS, *XII Tables, book 3:* Properly speaking we use "to be carried" of those things which someone transports with his body; "to be conveyed" of those things which someone takes with him on a beast of burden; "to be driven" of those things which are animals. 1. We do not describe as "carpenters" only those who cut wood but everyone who is a builder.

236 GAIUS, *XII Tables, book 4:* Someone who talks of "drug" must add whether it is harmful or beneficial; for medicaments are also drugs since under that heading everything is contained which when applied to something changes the nature of that to which it is applied. Given that that which we call drug is called by the Greeks *pharmakon*, among them also medicaments as well as harmful drugs are included in this category; therefore, the distinction arises by the addition of another term. Their greatest poet Homer informs us of this; for he says: "Drugs mixed together, many beneficial and many harmful." 1. In the designation "acorn," every fruit is included, as Javolenus says, following the example of Greek parlance among whom every kind of tree is described as *akrodrya*.

237 GAIUS, *XII Tables, book 5:* By two negative words the law, as it were, permits rather than prohibits; and this has also been noticed by Servius.

238 GAIUS, *XII Tables, book 6:* "*Plebs*" means citizens other than senators. 1. "*Detestatum*" means denounced in testimony. 2. "*Pignus*" is derived from *pugnus* (first) because things which are transferred as a pledge are transferred by hand. So also it may seem to be true as some people think that a pledge is properly speaking constituted of something movable. 3. In the designation of "noxal" every delict is included.

239 POMPONIUS, *Manual, sole book:* A "*pupillus*" is someone who, when he is not grown up, ceases to be in the power of his father either by death or by emancipation. 1. The designation of "slave" arose from the fact that our commanders are accustomed to sell captives and as a result preserve them and not kill them. 2. An "*incola*" is someone who has established his domicile in any region; the Greeks call such a person *paroikos*. Nor are those who stay in a town the only people who are *incolae* but also those who hold land within the territory of any town in such a way that they establish themselves there as if in a fixed abode. 3. "*Munus publicum*" is the duty of a private individual as a result of which an extraordinary benefit is conferred on his fellow citizens, individually or as a whole, and on their commonwealth at the command of a magistrate. 4. An "*advena*" is someone whom the Greeks call *apoikos*. 5. Some people say that the term "decurions" derives from the fact that at the beginning, when colonies were founded, a tenth of those who were being settled were usually included in order to provide a public council. 6. The term "*urbs*" is derived from *urbo*; *urbo* is to mark out by plow. And Varus says that *urbus* is the name for the curved part of a plow which is customarily used in the foundation of an *urbs*. 7. "*Oppidum*" is derived from *opes* (protection) because walls are built for its sake. 8. "Territory" is the totality of the fields within the boundaries of any community and some people say that this is derived from the fact that the magistrates of the place concerned have the right within its boundaries of terrifying, that is suppressing. 9. The word "his" is ambiguous whether it means the whole or part; and so someone who swears that something is not his must add that he has no share in it.

240 PAUL, *Imperial Views Pronounced in Judicial Examinations, book 1 out of 6 books:* When the question arose whether the clause "that the dowry is to be returned on the dissolution of marriage" covered not only divorce but also death, that is, whether the contracting parties thought also of this case, many people thought that they did think of this case and some other people thought the opposite; moved by this, the emperor pronounced that the intention of that pact was that under no circumstances should the dowry remain with the husband.

241 QUINTUS MUCIUS SCAEVOLA, *Definitions, sole book:* Those things are regarded as belonging to "*ruta caesa*" which are not planted in the soil and are not included in any building work or roofed structure.

242 JAVOLENUS, *From the Posthumous Works of Labeo, book 2:* Labeo says that a mast is part of a ship but a sail not, because in general ships are useless without a mast, so it is regarded as part of a ship; but a sail is more by way of an addition than a part of a ship. 1. Labeo says that this is the difference between "projecting" and "fixed," namely that something was projecting which had been made to protrude in such a way that it was not supported, such as balconies or eaves, while something was fixed which

was made in such a way that it rested on something such as timbers or beams which were fixed. 2. Labeo says that the lead which was fixed to tiles is part of a building but that that which was applied in order to cover an open space was not. 3. Labeo says that one calls a "widow" not only someone who was once married but also a woman who never had a husband, because the term bereft derives from the fact that the person is as it were destitute of reason, insane, without sense or sanity; likewise, the name of widow derives from the fact that she is alone. 4. Labeo says that the covering of some place made from planks which are removed in summer and put back in winter does form part of the house because they are intended for permanent use; nor does it make any difference that they are taken off at intervals.

243 SCAEVOLA, *Digest, book 18:* Scaevola replies: It has always been understood that in the designation of freedmen one also understands as being included those who are manumitted by the same will even in a lower position, unless the person from whom their freedom is being claimed shows that it is being claimed against the wish of the deceased person.

244 LABEO, *Plausible Views, Epitomized by Paul, book 4:* Any penalty is a fine and any fine is a penalty. PAUL: Both of these propositions are false. For the difference between the two things appears from this also that there is no appeal against a penalty; and at the same time anyone who is convicted of that crime for which a penalty is laid down must suffer it at once. But there is appeal against a fine, nor must it be paid unless no appeal has been lodged or the person appealing has failed; nor must it be paid unless it has been pronounced by someone who is entitled to pronounce it. The difference between the two things will also appear from this, that there are fixed penalties for individual crimes but that with fines it is in the power of the judge to prescribe the amount unless the amount is prescribed by law.

245 POMPONIUS, *Letters, book 10:* Statues fixed to masonry bases or pictures attached by chains or fixed to a wall, or lamps similarly fixed are not a part of a house; for they are required to decorate houses not in order to complete houses. Labeo holds the same view. 1. A porch, because again it is something which is usually included in a house, is part of a house.

246 POMPONIUS, *Letters, book 16:* The following plausible view is found in Labeo: A man who provides the presence of the person who is the subject of controversy exhibits him; for he also who places him provides the presence of the person who is the subject of controversy, but he does not, however, exhibit him; and someone who exhibits a mute or a madman or an infant cannot be regarded as providing his presence; for no one of that kind can properly be regarded as being present. 1. Someone has restored who provides not only the body but the entire thing and its entire associations with everything intact; and restitution is entirely a matter of the interpretation of the law.

17

VARIOUS RULES OF EARLY LAW

1 PAUL, *Plautius, book 16:* A rule is something which briefly describes how a thing is. The law may not be derived from a rule, but a rule must arise from the law as it is. By means of a rule, therefore, a brief description of things is handed down and, as Sabinus

says, is, as it were, the element of a case, which loses its force as soon as it becomes in any way defective.

2 ULPIAN, *Sabinus, book 1:* Women are debarred from all civil and public functions and therefore cannot be judges or hold a magistracy or bring a lawsuit or intervene on behalf of anyone else or act as procurators. Likewise, someone who is not grown up must abstain from all civil functions.

3 ULPIAN, *Sabinus, book 3:* The power of refusal belongs to someone who is in a position to be willing.

4 ULPIAN, *Sabinus, book 6:* Someone is not regarded as being willing if he obeys the command of a father or master.

5 PAUL, *Sabinus, book 2:* In the conduct of affairs, the position of people who are mad is different from the position of those who can speak without understanding the course of the matter; for someone who is mad cannot conduct any affair, but a pupil can do everything with his tutor as author.

6 ULPIAN, *Sabinus, book 7:* Someone who wished to transfer an inheritance to someone else does not wish to be the heir.

7 POMPONIUS, *Sabinus, book 3:* Our law does not allow the same person among civilians to die both testate and intestate; for there is a natural conflict between these states, "testate" and "intestate."

8 POMPONIUS, *Sabinus, book 4:* The rights of blood relationship cannot be destroyed by any enactment of civil law.

9 ULPIAN, *Sabinus, book 15:* In matters that are obscure we always adopt the least difficult view.

10 PAUL, *Sabinus, book 3:* It is according to nature for the advantages of anything to attach to the person to whom the disadvantages attach.

11 POMPONIUS, *Sabinus, book 5:* Something which is ours cannot be transferred to another without any action on our part.

12 PAUL, *Sabinus, book 3:* In the case of wills, we interpret in the fullest possible way the wishes of the testators.

13 ULPIAN, *Sabinus, book 19:* Someone whose right to claim has been abolished by the defense is not regarded as having received something.

14 POMPONIUS, *Sabinus, book 5:* In the case of all obligations in which the day is not named, the debt is owed on the present day.

15 PAUL, *Sabinus, book 4:* Someone who has an action to recover something is regarded as possessing the thing itself.

16 ULPIAN, *Sabinus, book 21:* An imaginary sale does not take place if the price is included.

17 ULPIAN, *Sabinus, book 23:* When a date is included in a will, it must be supposed that it is included on behalf of the heir unless the intention of the testator was otherwise, as in the case of stipulations a date is included for the sake of the man who promises.

18 POMPONIUS, *Sabinus, book 6:* In the case of things which go to our heir on our death, having been left to us, we acquire by means of ourselves their benefit for those in whose power we are; the case is different where we have made a stipulation; for even if we stipulate under a condition, we acquire for them in every way even if the condition arises when we have been freed from the power of our master.

19 ULPIAN, *Sabinus, book 24:* Someone who contracts with someone else either is or must be aware of his condition; but this obligation cannot be imposed on an heir when he contracts not of his own free will with the legatees. 1. The defense of fraud does not usually harm the case of those whom the will of the testator does not oppose.

20 POMPONIUS, *Sabinus, book 7:* Whenever there is any doubt over liberty in an interpretation, a reply must be given in favor of liberty.

21 ULPIAN, *Sabinus, book 27:* Someone who has a greater entitlement is not under obligation, because not to be entitled is a less favorable state.

22 ULPIAN, *Sabinus, book 28:* No obligation falls on a slave. 1. One must in general approve of the principle that wherever in actions of good faith the condition of someone is placed in the power of his master or of his procurator, then this power is to be regarded as equivalent to the power of the decision of a good man.

23 ULPIAN, *Sabinus, book 29:* Some contracts only involve bad faith, some also culpability. Deposit and *precarium* involve only bad faith. Mandate, loan for use, sale, acceptance in pledge, hire, likewise grant of a dowry, grant of tutelage, unauthorized administration involve bad faith and culpability; and, indeed, among these we include diligence. Partnership and a sharing of things involve bad faith and culpability, but only provided that no one made a specific agreement (for more or less) in single contracts; for this will be observed, namely what was agreed at the beginning (for the contract has established the legal position) except for what Celsus thinks is not valid, namely if there was an agreement that bad faith should be excluded; for this is contrary to an action of good faith; and this is our practice. Accidents to and deaths of animals which occur without culpability, flights of slaves who are not habitually under guard, armed robberies, riots, fires, floods, attacks of pirates are no one's fault.

24 PAUL, *Sabinus, book 5:* It is a matter of fact not law how far something is to someone's advantage.

25 POMPONIUS, *Sabinus, book 11:* There is more security in the thing than in the person.

26 ULPIAN, *Sabinus, book 30:* Someone who can alienate against the will of others can do so much more if they are in ignorance or absent.

27 POMPONIUS, *Sabinus, book 16:* Neither under praetorian nor under statute law can anything be changed by the agreement of private individuals although cases of obligations can be changed by agreement, both under the law itself and by the defense of the actual agreement; for the limit on actions introduced by the law or by the praetor is not weakened by the agreements of private individuals unless the agreement between them existed at the time when the action was begun.

28 ULPIAN, *Sabinus, book 36:* The deified Pius issued a rescript to the effect that those who are sued in order to secure a liberality are to be condemned for what they can afford.

29 PAUL, *Sabinus, book 8:* Something which is defective at the outset cannot be validated with the passage of time.

30 ULPIAN, *Sabinus, book 36:* Agreement and not sleeping together creates marriage.

31 ULPIAN, *Sabinus, book 42:* It is right that neither agreements nor stipulations can

undo something which has been done; for this is impossible, and it cannot be included in a pact or stipulation that it can establish a useful action or something that has been done.

32 ULPIAN, *Sabinus, book 43:* As far as concerns the civil law slaves are regarded as not existing, not, however, in the natural law, because as far as concerns the natural law all men are equal.

33 POMPONIUS, *Sabinus, book 22:* In a case where either the plaintiff or the defendant will gain, the case of the plaintiff is more difficult.

34 ULPIAN, *Sabinus, book 45:* In stipulations and in other contracts we always follow what has been done; or if it is not clear what has been done, the consequence will be that we shall follow what is the established practice in the region in which the action has taken place. What, then, if the custom of the region is not apparent either, because it was variable? The sum must be reduced to the lowest one available.

35 ULPIAN, *Sabinus, book 48:* Nothing is so natural as to dissolve something in the same way as that in which it is put together. So a verbal obligation is verbally dissolved. The obligation of bare consent is dissolved by contrary consent.

36 POMPONIUS, *Sabinus, book 27:* It is culpable to involve oneself in an affair with which one has no concern.

37 ULPIAN, *Sabinus, book 51:* No one who can condemn is unable to acquit.

38 POMPONIUS, *Sabinus, book 29:* Just as the heir of a dead person cannot be bound to pay the penalty arising from a delict, so he cannot benefit from it either if anything came to him as a result of the affair in question.

39 POMPONIUS, *Sabinus, book 32:* In all cases, something is regarded as done if someone else is responsible for any delay in its occurrence.

40 POMPONIUS, *Sabinus, book 34:* There can be no intention of a madman or someone whose property is under interdict.

41 ULPIAN, *Edict, book 26:* Nothing must be permitted to a plaintiff which is not permitted to a defendant. 1. In an uncertain case, it is better to favor a claim for restitution than adventitious gain.

42 GAIUS, *Provincial Edict, book 9:* Those who succeed to someone else's position have justifiable grounds for claiming ignorance as to whether what was claimed was in fact owed. Verbal guarantors also can allege justifiable ignorance to the same extent as heirs. This principle relates to heirs if they are the defendants not if they are the plaintiffs; for clearly someone who is a plaintiff must be certain, since it is in his power to pursue the case when he wishes and he must investigate the affair carefully first and then proceed to court.

43 ULPIAN, *Edict, book 28:* None of those who deny that they owe something is prohibited from using also another defense unless the law forbids. 1. Whenever several actions are competing under the name of the same defendant, someone must try one of them.

44 ULPIAN, *Edict, book 29:* We find in favor of the heir about something which comes to him whenever he is being sued as a result of the bad faith of the dead person, not whenever he is being sued as a result of his own bad faith.

45 ULPIAN, *Edict, book 30:* Neither a pledge nor a deposit nor *precarium* nor purchase nor hire can be made of one's own thing. 1. The agreement of private individuals does not derogate from public law.

46 GAIUS, *Provincial Edict, book 10:* No one is forced to restore to anyone what has been exacted from him as a penalty.

47 ULPIAN, *Edict, book 30:* There is no obligation from advice that is not fraudulent; but if bad faith and chicanery intervene, there is an action for fraud. 1. The partner of my partner is not my partner.

48 PAUL, *Edict, book 35:* Anything said or done in the heat of anger is not endorsed unless it appears from perseverance that it was a deliberate intention. And so a wife who returns after a short time is not regarded as having divorced her husband.

49 ULPIAN, *Edict, book 35:* Damage to one person does not provide an action for another.

50 PAUL, *Edict, book 39:* Someone is free of blame who knows about something but cannot prevent it.

51 GAIUS, *Provincial Edict, book 15:* Someone is not regarded as receiving something if it is necessary for him to restore it to someone else.

52 ULPIAN, *Edict, book 44:* Not only someone who is in hiding but also someone who is present and refuses to defend himself or does not wish to undertake an action is regarded as not entering a defense.

53 PAUL, *Edict, book 42:* What can be reclaimed, if given in error, is a gift, if given designedly.

54 ULPIAN, *Edict, book 46:* No one can transfer greater rights to someone else than he possesses himself.

55 GAIUS, *Wills in Relation to the Urban Praetor's Edict, book 2:* No one is regarded as acting by fraud who makes use of his rights.

56 GAIUS, *Legacies in Relation to the Urban Praetor's Edict, book 3:* In doubtful cases, the more generous view is always to be preferred.

57 GAIUS, *Provincial Edict, book 18:* Good faith does not allow the same thing to be claimed twice.

58 ULPIAN, *Disputations, book 2:* In penal cases, an action is not normally granted to a father over *peculium.*

59 ULPIAN, *Disputations, book 3:* It is agreed that an heir has the same powers and rights as the deceased person.

60 ULPIAN, *Disputations, book 10:* Someone who does not prevent intervention on his behalf is always regarded as mandating. And someone who endorsed something which was done is bound by an action on mandate.

61 ULPIAN, *Opinions, book 3:* Everyone is allowed to repair his own house provided he does not affect someone over whom he has no rights against his will.

62 JULIAN, *Digest, book 6:* An inheritance is nothing other than the succession to every right possessed by the deceased person.

63 JULIAN, *Digest, book 17:* Someone who appeals to a court without bad faith is not regarded as causing a delay.

64 JULIAN, *Digest, book 29:* Those things which occur rarely are not lightly to be reckoned with in the conduct of affairs.

65 JULIAN, *Digest, book 54:* The nature of a cavil, which the Greeks called *sorites*, is this, that the argument leads by short steps from what is evidently true to what is evidently false.

66 JULIAN, *Digest, book 60:* MARCELLUS. Someone ceases to be a debtor if he has acquired a just defense and one that is not contrary to natural equity.

67 JULIAN, *Digest, book 87:* Whenever the same expression contains two views, that one is most readily to be accepted which is more suitable to the conduct of the affair.

68 PAUL, *Reclaim of Dowry, sole book:* One must in all cases observe the rule that if the condition of a person provides grounds for favor; where that is lacking, the favor should also be lacking; where, however, the kind of action demands it, to whomsoever its prosecution has fallen, he should not lack the possibility of help.

69 PAUL, *Assignment of Freedmen, sole book:* A favor cannot be conferred on someone who is unwilling.

70 ULPIAN, *Duties of Proconsul, book 1:* No one can transfer to another the power of life or death or of any other punishment conferred on him.

71 ULPIAN, *Duties of Proconsul, book 2:* Anything which demands examination of the case cannot be settled by *libellus.*

72 JAVOLENUS, *From the Posthumous Works of Labeo, book 3:* Enjoyment of a thing includes the right to give it in pledge.

73 QUINTUS MUCIUS SCAEVOLA, *Definitions, sole book:* Inheritance follows tutelage unless female heirs intervene. 1. No one can grant a tutor to anyone except someone whom he had among his heirs when he dies or would have had if he had lived. 2. Something is regarded as having been done by force if someone did it when he was forbidden to do it; done secretly if someone did it when he thought that he had or would have controversy over it. 3. Those things which are written in a will in such a way that they cannot be understood are as if they were not written. 4. Nor can anyone stand surety for another by making a pact or laying a condition or stipulating.

74 PAPINIAN, *Questions, book 1:* An unfair condition must not be imposed on someone else through a third party.

75 PAPINIAN, *Questions, book 3:* No one can change his mind to someone else's disadvantage.

76 PAPINIAN, *Questions, book 24:* In general, things which have to be done intentionally cannot be done except in true and certain knowledge.

77 PAPINIAN, *Questions, book 28:* Legal acts which do not involve a day or a condition, such as emancipation, acceptilation, entry into an inheritance, option on a slave, grant of tutor are entirely vitiated by the addition of a time or a condition. Sometimes, however, the above mentioned acts tacitly involve something which, openly expressed, vitiates; for if something is regarded as being accepted by a man who promised under a condition, acceptilation is only regarded as having achieved something if the condition of obligation existed; and if this is explicitly excluded in the words of acceptilation, it makes the act invalid.

78 PAPINIAN, *Questions, book 31:* In general, when there is a dispute about fraud, one must not consider what the plaintiff does not have but what he could not have because of his adversary.

79 PAPINIAN, *Questions, book 32:* In the civil law, the interpretation of fraud is sought not only on the basis of the outcome but also on the basis of intention.

80 PAPINIAN, *Questions, book 33:* In the whole of law, species takes precedence over genus, and anything that relates to species is regarded as the most important.

81 PAPINIAN, *Replies, book 3:* Those things which are inserted in contracts in order to remove uncertainty do not damage general legal principles.

82 PAPINIAN, *Replies, book 9:* Something is regarded as being given which is handed over without the compulsion of any law.

83 PAPINIAN, *Definitions, book 2:* People are not regarded as losing something if it was not their property.

84 PAUL, *Questions, book 3:* If more was paid than was owed and that part which could be claimed back cannot be found, the understanding is that the entire debt is canceled and that the original obligation remains. 1. Someone owes something by nature if the law of nations in which we trust obliges him to give it.

85 PAUL, *Questions, book 6:* In uncertain cases, it is better to reply in favor of dowries. 1. It is not an innovation if something which has been usefully established remains, even though a state of affairs comes into existence which would be unable to provide it with a beginning. 2. If natural reason and hesitation over the law delay an equitable request, the affair must be settled according to just decrees.

86 PAUL, *Questions, book 7:* In general, the condition of those who have contested a law suit does not become worse than if they had not contested it, but usually better.

87 PAUL, *Questions, book 13:* For in pursuing a case no one makes it worse but better. Finally, after a lawsuit has been contested, one would also consider the heir, and the heir is bound in every respect.

88 SCAEVOLA, *Questions, book 5:* No delay is regarded as taking place where there is no petition.

89 PAUL, *Questions, book 10:* As long as a will can be valid, the statutory heir is not admitted.

90 PAUL, *Questions, book 15:* In every context but particularly in the law, equity must be considered.

91 PAUL, *Questions, book 17:* Whenever someone succeeds under a double right, the later right is repudiated, and the original right which is conferred earlier will survive.

92 SCAEVOLA, *Replies, book 5:* If a bookkeeper made a mistake in transcribing the words of the stipulation, it makes no difference to the fact that both a defendant and a verbal guarantor are bound.

93 MARCIAN, *Fideicommissa, book 1:* A son-in-power seems not to be able to retain or receive or obtain possession of anything relating to a *peculium.*

94 ULPIAN, *Fideicommissa, book 2:* Things which abound do not usually vitiate writings.

95 ULPIAN, *Fideicommissa, book 6:* No one doubts that someone who is defended seems in a position to settle.

96 MARCIAN, *Fideicommissa, book 12:* In ambiguous remarks one must most of all consider the intention of the man who made them.

97 HERMOGENIAN, *Epitome of Law, book 3:* An opinion in favor of deportation only carries off those things which come to the imperial treasury.

98 HERMOGENIAN, *Epitome of Law, book 4:* When an argument concerning profit occurs relating to two people, the man whose case relating to profit is earlier in time is to be preferred.

99 VENULEIUS, *Stipulations, book 12:* Someone who does not know how much he should pay cannot be regarded as being dishonest.

100 GAIUS, *Rules, book 1:* Everything which is legally contracted fails under a contrary law.

101 PAUL, *Judicial Examinations, sole book:* Wherever the law makes mention of two months, even someone who comes forward on the sixty-first day is to be heard; for this is the purport of a rescript of the Emperor Antoninus with his deified father.

102 ULPIAN, *Edict, book 1:* Someone who has acted against the command of the praetor is properly spoken of as having acted against the edict. 1. He who has the right to grant an action has the right also to deny it.

103 PAUL, *Edict, book 1:* No one may be extracted from his own house.

104 ULPIAN, *Edict, book 2:* If out of two actions one involves a large sum and the other infamy, the case dealing with reputation is to be put first. However, where they both involve infamy, cases involving reputation, even if they involve different sums, are to be regarded as equal.

105 PAUL, *Edict, book 1:* Wherever the judicial examination of the case takes place, there the praetor is needed.

106 PAUL, *Edict, book 2:* Liberty is a thing beyond price.

107 GAIUS, *Provincial Edict, book 1:* There is no action with a slave.

108 PAUL, *Edict, book 4:* In almost all penal cases, age and ignorance are a defense.

109 PAUL, *Edict, book 5:* A man who does not prevent an action when he can prevent it does not suffer any charge.

110 PAUL, *Edict, book 6:* In any case, where there is a possibility of more, there is also a possibility of less. 1. No one is regarded as a suitable guarantor for something which does not belong to him except with satisfaction. 2. A pupil is not regarded as being able to suffer [a charge]. 3. Where words are not joined, it is sufficient for one or other of them to be spoken. 4. Defense must be provided for women when a defense is entered, not in order that they be more easily slandered.

111 GAIUS, *Provincial Edict, book 2:* A pupil who is very near to puberty is capable both of theft and of causing injury. 1. Penal actions which arise from evil doing such as for theft, loss, injury, armed robbery, injuries are not usually transferred to the heir.

112 PAUL, *Edict, book 8:* It makes no difference whether someone fails to have an action because of the law itself or whether it is weakened by a defense.

113 GAIUS, *Provincial Edict, book 3:* The part also is contained in the whole.

114 PAUL, *Edict, book 9:* In unclear cases, one usually considers what is more likely or what usually happens.

115 PAUL, *Edict, book 10:* If anyone is freed from obligation, he can be regarded as having accepted. 1. Someone cannot be regarded as having accepted who, having stipulated, can be deprived of his defense.

116 ULPIAN, *Edict, book 11:* Nothing is so contrary to consent, which sustains cases of good faith, as force or duress; it is contrary to good behavior to approve of either of them. 1. Someone who follows public law is not liable. 2. Those who are in error are not regarded as agreeing.

117 PAUL, *Edict, book 11:* The praetor, in every case, regards the possessor of goods as in the possession of the heir.

118 ULPIAN, *Edict, book 12:* Someone who is in servitude cannot receive by usucapion; for since he is possessed, he is not regarded as possessing.

119 ULPIAN, *Edict, book 13:* Someone is not regarded as alienating if he simply loses possession.

120 PAUL, *Edict, book 12:* No one leaves a greater benefit to his heir than he himself had.

121 PAUL, *Edict, book 13:* Someone who does not do what he ought to seems to oppose this because he does not do it; and someone who does what he ought not to do is not regarded as doing what he was ordered to do.

122 GAIUS, *Provincial Edict, book 5:* Liberty is more desirable than anything.

123 ULPIAN, *Edict, book 14:* No one can legally act on behalf of another. 1. A temporary change does not alter the law of the province.

124 PAUL, *Edict, book 16:* Where presence, and not simply verbal assent, is necessary, a mute, provided that he has his wits, can be regarded as replying. Likewise, with someone who is deaf, he also can reply. 1. Someone who is mad is in the same position as someone who is absent, as Pomponius writes in the first book of his *Letters.*

125 GAIUS, *Provincial Edict, book 5:* Defendants rather than prosecutors are regarded with greater favor.

126 ULPIAN, *Edict, book 15:* No one is a robber who counted out the price. 1. Someone who has acquired a freedman is not made richer. 2. When one is considering the advantage of one or other of two, the case of the possessor is stronger.

127 PAUL, *Edict, book 20:* When the praetor gives an action against an heir, it is sufficient as far as he is concerned, if it came to him even for a moment by deceit of the dead man.

128 PAUL, *Edict, book 19:* In an equally balanced case, the possessor must be regarded as the stronger. 1. Those who succeed to entire control are regarded as being in the position of the heir.

129 PAUL, *Edict, book 21:* A creditor who takes his own property back does not act by fraud. 1. When the principal case does not stand, those which follow do not have any standing either.

130 ULPIAN, *Edict, book 18:* Actions, particularly penal, involving the same affair, never obliterate each other.

131 PAUL, *Edict, book 22:* Someone who has ceased to possess as a result of fraud is condemned as if he were the possessor since the fraud is for the sake of possession.

132 GAIUS, *Provincial Edict, book 7:* Lack of skill is regarded as culpable.

133 GAIUS, *Provincial Edict, book 8:* Our condition can be improved but not worsened by our slaves.

134 ULPIAN, *Edict, book 21:* Creditors are defrauded not when they fail to acquire something from a debtor but when some loss is caused to their property. 1. No one is allowed to improve his own condition by his own wrongdoing.

135 ULPIAN, *Edict, book 23:* Things which are impossible to give or which are not in the nature of things are regarded as not added [to a property].

136 PAUL, *Edict, book 18:* Good faith is of as much value as truth to a possessor as long as a statute is no impediment.

137 ULPIAN, *Edict, book 25:* Someone who has acquired something with a judge's backing is regarded as a possessor in good faith.

138 PAUL, *Edict, book 27:* Every inheritance, although it is entered into later, is regarded as existing at the moment of death. 1. The estimation of a past delict never grows afterward.

139 GAIUS, *Urban Praetor's Edict, sole book:* All actions which perish with death or the passage of time remain intact once the trial has begun. 1. Nothing is regarded as belonging completely to someone if it can be casually removed.

140 ULPIAN, *Edict, book 56:* The absence of someone who is away on public business must not be allowed to damage him or anyone else.

141 PAUL, *Edict, book 54:* Anything which has been accepted contrary to reason of law must not be produced for consequent cases. 1. Two people cannot be sole heirs to the entire property of one person.

142 PAUL, *Edict, book 56:* Someone who is silent does not necessarily confess; but yet it is true that he does not deny.

143 ULPIAN, *Edict, book 62:* Anything which stands in the way of those who contracted will stand in the way also of their successors.

144 PAUL, *Edict, book 62:* Not everything which is lawful is honorable. 1. In stipulations, the time at which we contract is considered.

145 ULPIAN, *Edict, book 66:* No one is regarded as deceiving those who know and consent.

146 PAUL, *Edict, book 62:* Something which someone did when he was a slave cannot benefit him when he is free.

147 GAIUS, *Provincial Edict, book 24:* The special is always included in the general.

148 PAUL, *Short Account of the Edict, book 16:* Anything whose effects benefit everyone has parts which also relate to everyone.

149 ULPIAN, *Edict, book 67:* Someone who makes a gain from someone else must endorse his deed.

150 ULPIAN, *Edict, book 68:* It is right that the condition of someone who possesses or holds something should be the same as that of someone by whose wicked fraud it was brought about that someone did not possess or hold something.

151 PAUL, *Edict, book 64:* No one causes loss except someone who has done something which he has no right to do.

152 ULPIAN, *Edict, book 69:* This is the law that we follow, namely, that anything done by force provokes a charge of public or private force. 1. Someone who mandates is also regarded as dislodging. 2. In the case of evil-doing, acquiescence after the fact is equated with mandate. 3. In contracts where liability for fraud or good faith is present, the heir is bound for the total sum.

153 PAUL, *Edict, book 65:* We are bound in more or less the same ways as those by which we are also freed; we acquire by the same means as those by which we also lose. As therefore no possession can be acquired except by mind and body, so none is lost except when both have also been counteracted.

154 ULPIAN, *Edict, book 70:* When the delict of two is equal, the plaintiff is always worse off and the case of the possessor is regarded as stronger. This happens also when there is a defense on the basis of the fraud of the plaintiff; for this reply is not granted to the plaintiff "*aut si rei quoque in ea re, dolo actum sit.*" Permission must be granted to someone to seek a penalty, if he is not liable to it himself.

155 PAUL, *Edict, book 65:* Each man's action must harm himself and not his adversary. 1. Someone who uses his right and brings an ordinary action is not regarded as applying force. 2. In penal cases, the milder interpretation is to be adopted.

156 ULPIAN, *Edict, book 70:* No one is forced to defend an action against his will. 1. It has been said that a defense falls even more readily to someone to whom we grant actions. 2. If someone has succeeded to the position of another, it is not right that he should be damaged by the fact that he was not responsible for any damage against the person to whose place he has succeeded. 3. Often in relation to suit and defense, the position of a purchaser must be the same as that of the warrantor. 4. Anything which is provided for someone on that account is not given to someone who is unwilling.

157 ULPIAN, *Edict, book 71:* Pardon is granted to slaves in relation to those things which do not have the atrocity of a crime or misdeed, if they have obeyed their masters or those who are in a position of masters such as tutors and curators. 1. Someone who has managed by fraud to have less is always to be treated as in the same position as if he did have it. 2. In contracts, successors, as a result of the fraud of those to whom they succeeded, are bound not only for what came to them but also for the total, that is, each one for that part for which he is heir.

158 GAIUS, *Provincial Edict, book 26:* A creditor who allows a thing to be sold releases his pledge.

159 PAUL, *Edict, book 70:* Although the same thing can be owed to us for several reasons, it cannot be ours for several reasons.

160 ULPIAN, *Edict, book 76:* Sale and consent to someone selling are different. 1. Anything publicly done by the majority is ascribed to everyone. 2. It is absurd for someone to whom an estate has been bequeathed to have a better right than the heir or the testator himself if he is living.

161 ULPIAN, *Edict, book 77:* It is established in the civil law that whenever anyone in whose interest it is for a condition not to be fulfilled arranged for it not to be fulfilled, the position is regarded as being the same as if the condition had been fulfilled. This is applied to liberty and legacies and institutions of heirs. And stipulations also are entered into on this basis when the promisor prevented the stipulator from obeying the condition.

162 PAUL, *Edict, book 70:* Anything which has been accepted as a matter of necessity must not be brought into argument.

163 ULPIAN, *Edict, book 55:* Anyone who possesses the right to give possesses also the right to sell and grant.

164 PAUL, *Edict, book 51:* Penal cases once accepted can be transmitted to the heirs.

165 ULPIAN, *Edict, book 53:* Anyone who can alienate can also consent to alienation. Anyone who is not allowed to give must prove his case, and if he grants it for the sake of giving, his intention is not to be regarded as valid.

166 PAUL, *Edict, book 48:* Someone who defends something which belongs to someone else is never regarded as rich.

167 PAUL, *Edict, book 49:* Those things are not regarded as given which do not become the property of the receiver at the moment when they are given. 1. Someone who does something at the order of a judge is not regarded as acting by evil fraud, as being someone who acts out of necessity.

168 PAUL, *Plautius, book 1:* The occasion of offering a mild reply must be seized. 1. When something which has been done is unclear, one derives one's interpretation from everyone's attitude.

169 PAUL, *Plautius, book 2:* Someone who orders a gift to be made causes loss; but no blame attaches to someone who acts out of necessity. 1. What is pending is not regarded as already in being.

170 PAUL, *Plautius, book 3:* Anything done by a judge which does not relate to his duties is not valid.

171 PAUL, *Plautius, book 4:* No one is bound because he is about to receive something from someone else, which has been provided by him.

172 PAUL, *Plautius, book 5:* In contracting a sale, an ambiguous pact is to be interpreted against the vendor. 1. However, an ambiguous intention is to be received in such a way that the matter is intact for the plaintiff.

173 PAUL, *Plautius, book 6:* In the condemnation of people who are condemned to pay what they can, the whole of what they have is not to be extorted, but account must be had of their position so that they may not be destitute. 1. When the word *restituas* is found in a law, even if there is no special clause about fruits, fruits also however are to be restored. 2. Everyone is damaged by his own delay. This is observed in respect of two persons liable on a promise. 3. Someone who claims what he is to restore acts by fraud.

174 PAUL, *Plautius, book 8:* One who can bring it about that he can satisfy a condition is regarded as already able to do so. 1. A man cannot repudiate something that he cannot have, though he wishes to have it.

175 PAUL, *Plautius, book 11:* A slave cannot intervene in those cases which statutes require to be done as a duty by free persons. 1. I must not be in a better position than my author from whom the right passes to me.

176 PAUL, *Plautius, book 13:* Individuals must not be allowed to do what a magistrate can do publicly in order that no occasion may arise for substantial tumult. 1. The estimation of liberty and necessity is infinite.

177 PAUL, *Plautius, book 14:* Someone who succeeds into the legal position or right of property of another must accept his rights. 1. No one is regarded as acquiring something by fraud if he is ignorant of the reason why he may not claim.

178 PAUL, *Plautius, book 15:* When the principal case does not stand, for the most part, those which follow do not have any standing either.

179 PAUL, *Plautius, book 16:* In a case where the wish of the manumitter is uncertain, preference is to be given to liberty.

180 PAUL, *Plautius, book 17:* Anything which is paid at the order of another is in the same position as something which is paid to the person himself.

181 PAUL, *Vitellius, book 1:* If no one enters the inheritance, the entire will fails.

182 PAUL, *Vitellius, book 3:* No obligation can ensure that something which cannot belong to anyone can belong to someone.

183 MARCELLUS, *Digest, book 3:* Even though it is not easy to change anything which is solemnly established, nonetheless, where evident equity demands it, a remedy must be found.

184 CELSUS, *Digest, book 7:* Empty fear does not provide a just defense.

185 CELSUS, *Digest, book 8:* There is no obligation to do anything which is impossible.

186 CELSUS, *Digest, book 12:* Nothing can be claimed before the time at which it may naturally be paid; and if a time for payment is added to the obligation, the thing cannot be claimed unless the time is past.

187 CELSUS, *Digest, book 16:* Someone who leaves a pregnant wife is not regarded as dying without issue.

188 CELSUS, *Digest, book 17:* Where a will made mutually conflicting provisions, neither is valid. 1. Those which are prohibited by nature are not endorsed by any law.

189 CELSUS, *Digest, book 13:* A pupil is not regarded as being willing or unwilling at that stage unless the authority of the tutor is added; for anything which takes place by intention of the mind must have the authority of the tutor.

190 CELSUS, *Digest, book 24:* Anything which is evicted is not part of someone's property.

191 CELSUS, *Digest, book 33:* Neratius was consulted as to whether a favor which Caesar had granted in a rescript to someone who was living was regarded as granted to the same person when dead; he replied that he did not think that the emperor had made a grant to a dead person which he had granted to someone whom he thought to be living; however, it was in his power to decide what limit he wished there to be to his favor.

192 MARCELLUS, *Digest, book 29:* Those things which cannot be divided into parts are owed in their entirety by individual heirs. 1. In any case which is uncertain, to follow the milder interpretation is no less just than safe.

193 CELSUS, *Digest, book 38:* Virtually, all rights of heirs are treated as if the heirs had existed forthwith after the time of death.

194 MODESTINUS, *Distinctions, book 6:* Those who have emerged as heirs to a deceased person by however long a process of succession are regarded no less as heirs than those who emerge principally as heirs.

195 MODESTINUS, *Distinctions, book 7:* Express provisions damage; implicit provisions do not damage.

196 MODESTINUS, *Rules, book 8:* Some dispensations relate to things, some to persons. And so those which relate to things are transmitted to the heir; those which relate to persons are not transmitted to the heir.

197 MODESTINUS, *Right of Marriage, sole book:* Always in unions one must always consider not only what is lawful but what is honorable.

198 JAVOLENUS, *Cassius, book 13:* Neither in interdict nor in other cases must the fraud of the tutor damage the pupil, whether he [the tutor] be solvent or not.

199 JAVOLENUS, *Letters, book 6:* Anyone who disobeyed the command of a magistrate cannot avoid being guilty of fraud.

200 JAVOLENUS, *Letters, book 7:* Whenever anything cannot be investigated without loss, that course must be chosen which has the least iniquity.

201 JAVOLENUS, *Letters, book 10:* Everything which proceeds from a will has a successful conclusion if it had an unflawed beginning.

202 JAVOLENUS, *Letters, book 11:* Every definition in civil law is dangerous; for it is rare for the possibility not to exist of its being overthrown.

203 POMPONIUS, *Quintus Mucius, book 8:* If anyone incurs loss which is his own fault, he is not regarded as incurring loss.

204 POMPONIUS, *Quintus Mucius, book 28:* It is less to have an action than to have the thing.

205 POMPONIUS, *Quintus Mucius, book 39:* It often happens that even those things which can depart from us are in the same state as if they were not in such a position that they could depart. And so what we owe to the imperial treasury we can, in the meanwhile, vindicate and alienate and saddle with a servitude in the case of an estate.

206 POMPONIUS, *Various Readings, book 9:* By the law of nature it is fair that no one become richer by the loss and injury of another.

207 ULPIAN, *Lex Julia et Papia, book 1:* A matter judicially decided is treated as true.

208 PAUL, *Lex Julia et Papia, book 3:* No one can be regarded as having ceased to have who never had.

209 ULPIAN, *Lex Julia et Papia, book 4:* We compare slavery closely with death.

210 LICINNIUS RUFINUS, *Rules, book 2:* The institution of an heir that was not valid from the outset cannot become valid by subsequent events.

211 PAUL, *Edict, book 69:* A slave cannot be absent on state business.

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